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ELEMENTS
OF
THE LAW OF TORTS
FOR THE
USE OF STUDENTS

BY
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SECOND EDITION

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PREFACE.

THE purpose of this little book is to answer the question, What constitutes a tort? It has nothing, primarily, to do with questions relating to the enforcement of the law for the commission of an admitted tort; that is, with questions of procedure. The law of procedure constitutes a distinct head, and, taken comprehensively, so as to include all branches of civil redress, will form the subject of a separate treatise in the series for law students begun by the present work.

It would be impossible, however, to present the substantive law of torts in any useful manner without more or less reference to the adjective law (as Bentham and Austin have fitly termed the law of procedure); and wherever it has been deemed necessary to state any of the principles relating to procedure, in order to the better understanding of the subject in hand, the author has acted accordingly.

The whole law of torts might, indeed, be studied with profit from the stand-point of procedure; and it has generally been thus studied. The objection to this method is, that it emphasizes that which is accidental and shifting over that which is real and permanent. The chief principles of the English law of

torts prevail in all civilized countries, while each State has its own mode of enforcing the law ; and the study of the common-law system of pleading, though a matter of the highest importance, is the study of rules that to-day are largely mere matter of history.

For purposes of historical investigation the study of the law of torts, from the stand-point of the common-law system of pleading has advantages over all other methods. Indeed, the substantive law of torts has been moulded into its present form by the application of doctrines of pleading to the question of agitated rights almost more than by the validity or justness of the rights themselves. But a series of duties growing out of the contentions of litigants, and modified by the adjective law, has long since become established ; and these duties may now be brought together and treated as a permanent embodiment of the substantive law, — permanent at least in their main features.

To present these duties properly is to answer the question, What constitutes a tort ? And, unless the method suggested by pleading be adopted, it is apprehended that this is the only useful way to present the law. Unlike contracts, torts spring, not from a common centre, but from a series of different centres. Almost every contract runs back at the last analysis to a common definition, applicable to all contracts ; but this cannot be said of every tort. The elements which enter into the constitution of an action for slander cannot be made to coincide with those which belong to an action for a conversion or for a malicious prosecution or for damage caused by negligence. Each one of these topics has its own peculiar rules of

law, making it a distinct head ; and the same is true of all other branches of the general subject. The only connecting link binding the whole chain of torts is probably to be found in a theory of intention ; that is, of liability for that which has been actually or presumably intended.

There is, then, no such thing as a typical tort ; and, in seeking to determine what constitutes a tort, it must be understood that the question can be answered only with reference to a particular branch of the general subject embraced under the title of Torts.

Acting upon this fact, the author has endeavored to point out the elements entering into the legal conception of each of the various classes of torts ; arranging the classes according to their natural affinities, as evidenced by some general, characteristic feature. In certain branches of torts it is found that an evil motive is a common legal element ; in certain others, careless conduct is a general legal characteristic ; while between these extremes lies an extensive class of cases, in which for the most part liability is made to depend upon the doing or omitting to do an act, regardless of the party's state of mind or conduct. In the present work, as in the author's *Leading Cases on Torts*, the arrangement of the several classes of torts is based upon the suggestion of these facts. Another division, based upon a generalization of the duties themselves, as determined by the situation of the parties to the action, and of some value for the purpose of definition, is given in the Introduction.¹

¹ With these divisions, compare 7 Am. Law Rev. 652, "The Theory of Torts," an article suggesting this classification.

It is deemed proper to say that the authorities cited through the book are cited not merely because they are judicial decisions, but also because they will be found profitable for instruction. The author has studiously avoided citing a multitude of cases, and has referred to such only as may be examined by the student with profit; not that other equally good cases may not often be found, but that those cited were deemed sufficient both in number and quality for the object sought to be obtained by this work. Upon questions of conflict of authority, this plan has been somewhat departed from, and many cases have been cited which otherwise would have been omitted.

Boston, May 1, 1878.

NOTE TO THE SECOND EDITION.

THE first edition of this work has been subjected to thorough examination, the result of which is that only slight changes have been found needful. A few cases have been added.

Boston, Oct. 1, 1882.

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INTRODUCTION.

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INTRODUCTION.

THE substantive law of torts treats of the civil aspect of duties, and, by consequence, of the breach of duties, which govern the relations of individuals to each other (1) as mere members of the State ; or (2) as occupying some special situation towards each other not produced by agreement *inter sese* ; or (3) as occupying some special situation of agreement *inter sese* which affords occasion for breaches of duty between them that need not be treated as breaches of contract.

Most of the law of torts will be found to fall under the first division, — that of breaches of duty between individuals as mere citizens. The law relating to the following subjects belongs to this head: Deceit (in part), Slander and Libel, Malicious Prosecution, Conspiracy, Assault and Battery (in part), False Imprisonment (in part), Enticement and Seduction, Trespasses upon Property (in part), Conversion, Infringements of Patents and Copyrights, Violation of Rights of Support, Violation of Water Rights, Nuisance, Damage by Animals, Escape of Dangerous Elements or Substances, and Negligence (in part).

Under the second division, — where a duty has been broken which prevailed by reason that the par-

ties concerned occupied a special situation towards each other, not produced by agreement *inter sese*,— will fall the law relating to Public Officers (under which subject is included that part of the law relating to Assault and Battery, False Imprisonment, and Trespasses upon Property, not embraced under the first head), and the law relating to the duty of Innkeepers to receive guests, and of Common Carriers to receive passengers or goods, according to the nature of their business, and the law of Waste.

Under the third division, where parties occupy a situation of agreement among themselves which affords opportunity for breaches of duty that need not be treated as breaches of contract, will fall a part of the law relating to Deceit, which is also embraced under the first head,¹ and the law relating to Innkeeper and Guest, Common Carriers, other Bailees, and other Contractors, several of these subjects being also embraced under the title Negligence.

The liability of a principal for the torts of his agent, or of a master for the torts of his servant, forms no part of a consideration of the nature of torts, but belongs to the subject of agency; since the question in such cases is, not whether the act complained of is a tort, but whether, conceding it to be a tort, the principal or master is liable; in other words, not whether a tort has been committed, but who committed it. It would not be useful, however, to adhere too strictly to the consequences of this fact; for it

¹ Deceit in sales, in which the wrong may be treated as either a tort or a breach of warranty.

often happens that the question of agency is so intimately associated with the question of the commission of the tort that to draw the line sharply would be to conform to theoretical divisions at too great an expense.

Such, also, would be the inconvenience to arise from breaking up well recognized subjects of the law, that it is not advisable to adhere too strictly to the general division suggested. It will doubtless be better to present the topics indicated as belonging in part to one head and in part to another, in full in one place; and then to make such further reference to them elsewhere as may be important.

The following are closely related subjects by reason of the peculiar *animus* (intent) which must be shown as essential to a right of redress for the alleged breach of duty: Deceit, Slander and Libel, Malicious Prosecution, and Conspiracy. In cases arising under any of these heads, excepting Slander and Libel, express evidence of the intent must generally be given; but the *animus* may be disproved though the act itself was voluntary.

In cases arising under any of the following heads, a wrongful intention is shown by proof of the commission of the act, and cannot be disproved except by showing that the act was constrained: Assault and Battery,¹ False Imprisonment, Enticement and Seduction, Trespasses upon Property, Conversion, Infringements of Patents and Copyrights, Violation of Rights to Support, Violation of Water Rights, Nuisance,

¹ The question of intent to commit an assault or a battery is peculiar, as will be seen in the examination of the subject.

Damage by Animals, and Escape of Dangerous Elements or Substances.

In cases arising under the head of Negligence, the breach of duty consists in damage caused by a failure to conform to the care or diligence or skill observed by prudent men. Here the result may be treated as presumably intended. It has happened as the natural consequence of the conduct in question; it was therefore to be expected by the person guilty of it. That is, he intended it. No express evidence to that effect is required.

These topics, all of which fall under the first general division of duties prevailing between individuals as mere members of the State, will be presented in the order of grouping here given. The topics falling under the second general division will follow; and, after these, those of the third division. The topics of the second and third divisions will, however, be substantially disposed of (owing to their connections) under the first division; so that nothing more than a succinct statement of the duties involved will afterwards be necessary.

ELEMENTS
OF
THE LAW OF TORTS.

ELEMENTS

OF

THE LAW OF TORTS.

I. DUTIES WHICH GOVERN THE RELATIONS OF INDIVIDUALS TO EACH OTHER AS MERE MEMBERS OF THE STATE.

CHAPTER I.

DECEIT.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty to forbear to mislead him to his prejudice by false and artful representations, apt to mislead.

OBSERVATIONS.

1. Deceit, properly speaking (that is, not mere *mistake* in the party committing it), is a ground of defence to the enforcement of a contract, and is also ground for proceedings by the injured party to rescind a contract; provided the deceit was a material inducement to the formation of the contract. In such cases, the same facts are necessary for establishing the deceit as are necessary to an action of or for deceit.¹ Hence, authorities concerning the proof of actual deceit in such cases of contract are authorities by

¹ *King v. Eagle Mills*, 10 Allen, 548; *Wilder v. De Cou*, 18 Minn. 470.

proper inference for an action for damages by reason of such deceit.

2. The action at law for damages by reason of deceit is called indifferently an action *of* deceit or an action *for* deceit. The former term points to the form of the action; the latter to the substance of it.

3. When it is said that a particular representation is a breach of duty, or of legal duty, or of the duty under consideration, it is to be understood that the other elements necessary to constitute the complete breach of duty (where not referred to) are supposed to be present.

4. The breach of duty affords a right of action for damages.

5. These observations will be true of the other subjects of the work, so far as applicable to them, and need not be repeated with each new chapter.

In order to establish a breach of the duty above stated, and to entitle B to civil redress therefor, B, unless he come within one of the qualifications to the rule, must make it appear to the court that A has made (1) a false representation of material facts; (2) that he made the same with knowledge of its falsity; (3) that he (B) was ignorant of its falsity and believed it to be true; (4) that it was made with intent that it should be acted upon; (5) that it was acted upon by him (B) to his damage. But each of these general elements of the rights of redress must be separately examined and explained, and the qualifications to the same presented. The designation of the parties as A and B may now be dropped, and B will be spoken of as the plaintiff, and A as the defendant.

§ 2. OF THE REPRESENTATION.

It is proper first to consider the meaning of the term "representation" and its nature, and thus to ascertain

what sort of representation is necessary (assuming the other elements present) in order to entitle the plaintiff to redress against the defendant.

The representation need not be in words : there is no distinction in law between deception practised by acts or active conduct alone and deception practised by words. [For example : The defendant procures the indorsement of a party to a note or bill, in order to effect a sale of it to the plaintiff. This act is deemed to be equivalent to an affirmation that such person is competent to indorse the paper and thus to bind himself by his indorsement ; and, if he be not, the defendant, who procured the indorsement, is liable to the plaintiff, to whom he sold the paper by means of the deception.¹ Again : The defendant sells to the plaintiff personal property, of which he is in possession. This is deemed an affirmation that he is the owner thereof ; and, if that be not the truth, he is liable to damages in favor of the purchaser.²]

In the cases of which these two are examples, the representation is implied, not from any peculiar overt conduct of the defendant, but because it is deemed to be a reasonable interpretation of the act of selling the note or bill, or the goods, that the purchaser should believe the paper to be enforceable or the goods to be the seller's.

A like rule of law prevails in regard to those incidents of a sale of goods intended for a special purpose, which materially affect the quality and usefulness of the articles. [The vendor of provisions sold for consumption is liable to the purchaser if they be not wholesome, though no statement was made concerning them, or any attempt made to mislead the purchaser as to their condition. One who manufactures goods for a particular person, for a special use known to the former, subjects himself to liabil-

¹ *Lobdell v. Baker*, 1 Met. 193 ; *Mizner v. Kussell*, 29 Mich. 229.

² *Coolidge v. Brigham*, 1 Met. 547, 551.

ity if they do not answer the intended purpose. A secret defect in an article sold, materially changing its nature, and rendering it unfit for the purpose for which it was intended, may also render the seller liable in damages to the purchaser.¹ These instances are none the less instances of torts because they may be treated as breaches of contract.]

With the exception of cases covered in principle by some of these special illustrations of liability for representations implied from passive conduct, such conduct is not treated as amounting to a breach of legal duty. Mere passive concealment in other cases, that is, concealment not attended with any active misconduct tending to mislead the plaintiff, is deemed not to afford a ground of action. The buyer of property is not guilty of a breach of legal duty by reason of his failure to communicate to the seller intelligence of external circumstances not known to the latter which might materially influence the price of a commodity.² The slightest misconduct of an overt nature, having a natural tendency to mislead, will, however, serve to make the defendant liable.³

Where, however, the defendant has been charged with conduct of an overt character, amounting to a breach of his duty, the whole course of his conduct on the occasion in question may be taken into consideration, as tending to show or to disprove the alleged breach of duty. As to questions of this kind, it is deemed sufficient, to establish the right of action in this particular, that the conduct of the defendant was such, that a reasonably cautious and

¹ See upon this subject of passive concealment, *Paddock v. Strobbridge*, 29 Vt. 470.

² *Laidlaw v. Organ*, 2 Wheat. 178; *Kintzing v. McElrath*, 5 Barr, 467; *Smith v. Countryman*, 30 N. Y. 655, 670, 671. A contrary rule prevails in Mississippi and in Missouri. *Patterson v. Kirkland*, 34 Miss. 423; *Cecil v. Spurger*, 32 Mo. 462.

³ *Laidlaw v. Organ*, *supra*.

prudent man might be misled as to the existence of the particular fact.¹

It follows that when actual language is used to convey the false representation, the defendant cannot evade the force of the impression which he has reason to know the plaintiff has received thereby, by a resort to a literal meaning of the same, when this is different from its natural meaning in the particular case.²

It further follows that, to constitute a false representation, it is not necessary that statements should be made in terms expressly affirming the existence of some untrue fact. If the alleged misrepresentation be made by the defendant in terms such as would naturally lead the plaintiff to suppose the existence of such and such a state of facts, that is as much as if statements had so been made in exact terms.³

The misrepresentation complained of should also be clear and certain: The plaintiff does not establish the alleged breach of duty, if the evidence show that the representation was of ambiguous or otherwise doubtful import. [For example: A vendor of land points to a certain tree as the *probable* boundary of his premises, and the plaintiff purchases it in reliance upon that statement as a statement of the actual boundary. The plaintiff cannot maintain an action for damages against the vendor.⁴]

This rule of law rests upon the ground that no man of common prudence and sagacity would rely and act upon a representation of an indefinite nature. The fact that the representation is indefinite would serve to put such a person upon further inquiry before taking action; and no action would finally be taken without certain information.

¹ Donovan v. Donovan, 9 Allen, 140.

² Mizner v. Kussell, 29 Mich. 229.

³ Lee v. Jones, 17 Com. B. N. S. 482; s. c. 14 Com. B. N. S. 386.

⁴ See Halls v. Thompson, 1 Smedes & M. 443.

The plaintiff in the particular litigation must stand or fall by this standard. And this is true as well when the representation is conveyed by mere conduct as when it is conveyed by words. The plaintiff should make it appear that the conduct imported a definite representation, such as would justify a prudent man in taking the action complained of.

Upon the principle that there can be no breach of this legal duty unless the representation be so definite as to justify a prudent man in relying upon it, the representation under consideration cannot consist in the expression of an opinion, however false.¹ [For example: An agent of a railroad company makes false statements in regard to the value of a donation of land made to the company, and in regard to the amount of assets of the company, and the probable cost and profits of the road when completed. This is not a breach of the duty in question, however great the damage ensuing.²]

Under this rule of law, it is considered, as the last example indicates, that statements of value by the owner of property, however strongly made, are not breaches of the duty.³ [Indeed, it is held by some of the courts that misrepresentations of what an article or a tract of land cost, or what it has been sold for, or of a sum offered for it, do not involve the party making them in any liability.⁴ And the court of one State has gone still further and held, — though not without a division of opinion among the judges, — that a statement that certain lands had large

¹ See *Anderson v. Hill*, 12 Smedes & M. 679; *Tuck v. Downing*, 76 Ill. 71.

² *Anderson v. Hill*, *supra*. The question in this case arose upon a suit to enforce payment of a subscription of stock; but this would not change the rule.

³ *Medbury v. Watson*, 6 Met. 246; *Ellis v. Andrews*, 56 N. Y. 83.

⁴ *Medbury v. Watson*, *supra*; *Cooper v. Lovering*, 106 Mass. 79; *Martin v. Jordan*, 60 Maine, 531; *Bishop v. Small*, 63 Maine, 12.

deposits of oil within them, and were of great value for manufacturing oil, was a statement of opinion merely.¹ There is, however, strong authority opposed to the first of these two propositions, and by inference to the second.²

There is ground, therefore, for doubting the correctness of the above-stated propositions; and this ground is strengthened by the fact that it is generally conceded in other and parallel classes of cases that false representations of the elements of fact, going to make up value, are not statements of opinion.³ [For example: The defendant issues a prospectus containing favorable but false statements of the pecuniary condition of a corporation, in order to make it appear desirable to the plaintiff (as one of the public) to subscribe to the stock of the company. This is a breach of the defendant's duty.⁴]

Statements concerning the pecuniary condition of an individual are not necessarily statements of opinion, and when distinctly and specifically made may be breaches of the duty under consideration. [For example: The defendant says to the plaintiff, "F. is pecuniarily responsible. You can safely trust him for goods to the amount of £3,000." This is a definite representation, and may constitute a breach of duty.⁵]

Very slight expressions, however, are considered as sufficient to put statements of this character on the footing of statements of opinion. [For example: The defendant, in answer to inquiries as to the circumstances and credit of a third person, says to the plaintiff, "*I should be willing to give him credit for any thing he wanted.*" This

¹ *Holbrook v. Connor*, 60 Maine, 576.

² *Van Epps v. Harrison*, 5 Hill, 63; *Page v. Parker*, 43 N. H. 363; *McFadden v. Robinson*, 35 Ind. 24; *Morehead v. Eades*, 3 Bush, 121.

³ *Ellis v. Andrews*, 56 N. Y. 83, 86.

⁴ *Campbell v. Fleming*, 1 Ad. & E. 40; *Bedford v. Bagshaw*, 4 Hurl. & N. 538. See *Bradley v. Poole*, 98 Mass. 169.

⁵ *Pasley v. Freeman*, 3 T. R. 51; s. c. *Bigelow's L. C. Torts*, 1.

statement cannot safely be acted upon by the plaintiff. The mere fact that the *defendant* may be willing to give him credit does not necessarily justify the plaintiff in doing so.¹

The principle by which a statement of opinion is considered as not capable of amounting in law to a breach of duty proceeds, however (with reference to some situations at least), upon the hypothesis that the opinion is honestly entertained; and in such situations, if the opinion be dishonestly expressed, the statement of it may afford a ground of redress. [Such a situation is deemed to exist when the defendant as an expert puts forth to the plaintiff, in the form of opinion, that concerning which he has positive knowledge at variance with the opinion. For example: The defendant, a cattle dealer, desiring to sell cattle to the plaintiff, expresses an apparent opinion that the cattle will weigh 900 lbs. and upwards per head. But the defendant has already weighed the cattle, and knows that their average weight is considerably below 900 lbs. This is a breach of duty.²]

The representation should relate to a present or past state of facts: if it relate to a matter in the future, it must, in the nature of things, be uncertain.³ If, however, the statement be the expression of an intention, and it be made to appear that the defendant in truth had no such intention when he made the statement, the case would (probably) be a breach of the duty under consideration.⁴

The allegation of only part of the truth, with a view to the deception of the plaintiff, falls within the same prin-

¹ Gainsford v. Blackford, 7 Price, 544.

² Birdsey v. Butterfield, 34 Wis. 52. See Picard v. McCormick, 11 Mich. 68; Kost v. Bender, 25 Mich. 515; Pike v. Fay, 101 Mass. 134.

³ See Jordan v. Money, 5 H. L. Cas. 185; Citizens' Bank v. First Nat. Bank, Law R. 6 H. L. 352, 360; Pedrick v. Porter, 5 Allen, 324.

⁴ Compare Kimball v. Ætna Ins. Co., 9 Allen, 540. See also Paull v. Halferty, 63 Penn. St. 46.

ciple, and may be a breach of the duty under consideration equally with a statement of that which is false *in toto*.¹

[For example: The defendant, being desirous of purchasing certain stock of the plaintiff (a lady), of the value of which he knows her to be ignorant, tells her of a fact calculated to depreciate the value of the stock; but he omits to disclose to her other facts within his knowledge which would have given her correct information on the subject. The other elements of the breach of duty being present, this is deemed a tortious misrepresentation.]²

The false representation which may be treated as a breach of the duty must, however, have been material; that is, it must have been one without which the action taken to the plaintiff's detriment would not have been likely to follow.

This rule does not mean that the particular misrepresentation complained of must have been the sole inducement to the plaintiff's action and damage. The rule simply means that the representation must have been a sufficient motive, in the presence of other inducements, to cause the plaintiff to act as he did.³

The false representation, further, should be of matter of fact, and not of matter of law; otherwise, except in cases to be mentioned presently, there is no breach of the duty under consideration. A representation as to what the law will or will not permit is a matter upon which the party to whom it is made cannot safely rely. If he should rely upon it, the courts will not grant him redress, though he suffer damage thereby.⁴ [A stockholder in a corporation cannot therefore maintain an action against the company for misinforming him of the legal effect of his contract of subscription.]⁵

¹ Mallory v. Leach, 35 Vt. 156.

² Ib.

³ McAleer v. Horsey, 35 Md. 439.

⁴ Upton v. Tribilcock, 91 U. S. 45, 50.

⁵ Ib.

It is not, however, universally true that a misrepresentation of the law may not be a ground for redress. If a person, having superior means of knowing the law, should fraudulently profess to give correct information concerning it to one ignorant thereof, this would be a misrepresentation within the meaning of the rule at the beginning of the present chapter. [For example: An immigrant, having lately arrived from abroad, meets an old citizen who professes familiarity with the land titles of the country, and proposes to sell the former land, to which he assures the immigrant his title is valid in law. He is bound by the representation.¹]

§ 3. OF THE DEFENDANT'S KNOWLEDGE OF THE FALSITY OF HIS REPRESENTATION; THAT IS, OF THE SCIENTER.

Next in order of the elements necessary to constitute a breach of the duty under consideration, is the defendant's knowledge of the falsity of his representation.

The general proposition of law in this connection is, that an honest statement of fact, believed to be true by the defendant when he made it, though made with a view to its being acted upon, and justifying action upon it according to the conduct of prudent men (as explained in the preceding section), will not, upon turning out to be false, create a liability in the defendant to respond therefor in damages.² Fraud (for the right of action for deceit is founded upon evidence of fraud) is not established, so far as this general proposition of law governs the rights of the parties, without proof on the part of the plaintiff that the defendant *knew* that the representation was false. The law raises no presumption of knowledge from the single fact *per se* that the representation was false: there must

¹ Moreland v. Atchison, 19 Tex. 303.

² Haycraft v. Creasy, 2 East, 92; Collins v. Evans, 5 Q. B. 820; Mahurin v. Harding, 28 N. H. 128; Case v. Boughton, 11 Wend. 106.

be something further to establish the defendant's knowledge.¹ And proof of such knowledge is termed, in technical language, proof of the *scienter*.²

There are, however, as intimated, many situations in which this general proposition of law does not hold good, — situations from which the law *does* raise a presumption of the defendant's knowledge of the true state of things concerning which he has made the false representation. Or more accurately, there are many cases in which the law holds the defendant, from his special situation towards the facts, bound to know of the truth of his representation. Such cases must now be presented.

These cases may, for the most part, be embraced under the principle that every man is supposed in general to know all matters pertaining to his own peculiar circumstances, or to the state of his own business. If the defendant be shown to have made a false representation of such a matter, he will not generally be permitted — as against an innocent plaintiff who has suffered by reason of such false representation — to say that he made it honestly, believing it to be true.³ [For example: The defendant states to the plaintiff that he (the former) is worth \$6,000. The plaintiff need not prove that the defendant knew the statement to be false.⁴]

One of the most common class of cases of this kind is that of express or implied representations of agency. It is settled law that if a person, however honestly, assume

¹ *Barnett v. Stanton*, 2 Ala. 181; *McDonald v. Trafton*, 15 Maine, 225.

² From the old term (signifying the defendant's knowledge) used in the plaintiff's declaration when pleadings were in Latin.

³ *Morse v. Dearborn*, 109 Mass. 593. See *Collen v. Wright*, 8 El. & B. 647; *Randall v. Trimen*, 18 Com. B. 786; *White v. Madison*, 26 N. Y. 117, 124; *Jefts v. York*, 4 Cush. 371; *Johnson v. Smith*, 21 Conn. 627; cases really turning upon this principle.

⁴ *Morse v. Dearborn*, *supra*.

to act for another in respect of a matter over which he has no authority, he renders himself liable to the person whom he has thus misled.¹ Such an action is a breach of his duty to the latter equally with an intentional misrepresentation. The extent of his authority, as well as the existence of any authority at all, to act for the supposed principal is a matter of his own business, with which he is bound to fully acquaint himself.² [For example: The defendants, a telegraph company, deliver to the plaintiff a message never sent by the assumed sender. They may be liable to the plaintiff as for a false representation of their authority to deliver the message, though the operator who transmitted it innocently misread the writing.³]

While, however, a person professing to be an agent is liable in damages in case he does not possess the assumed authority; still, if he honestly and fully disclose all the facts touching the supposed authority, he cannot be treated as having violated his duty, though the plaintiff should honestly suppose, with the defendant, that such facts gave him the authority in question.⁴ No false representation has been made; the defendant has told the truth, and the plaintiff has drawn his own inference from the facts.

[Upon the same presumption that a man knows the nature and state of his own business, it might possibly follow that a managing director of a corporation who issues or author-

¹ See the authorities just cited.

² The breach of duty is often treated as a breach of implied warranty of authority, but it may also be treated as a case of deceit, redressible by an action *ex delicto*. *Mahurin v. Harding*, 28 N. H. 128; *Noyes v. Loring*, 55 Maine, 408; *Indiana R. Co. v. Tyng*, 63 N. Y. 653.

³ *May v. Western Union Tel. Co.*, 112 Mass. 90. The law in England as to telegraph companies is different. *Playford v. United Kingdom Tel. Co.*, Law R. 4 Q. B. 706. But the principle is English, as the cases above cited (p. 19, note) show.

⁴ *Newmann v. Sylvester*, 42 Ind. 106.

izes the issue of a prospectus containing false representations of the condition of the company, likely to deceive the public, could not reply to a demand for damages by one of the public misled by the prospectus into embarking in a rotten concern, that he believed the representations made to be true. But the authorities do not go so far. Clearly one who merely allows his name to be used as trustee of a corporation, to bolster its stock, which turns out to be worthless, is not liable in deceit.¹ Knowledge by him of the condition of the company must be proved.²

There is another class of cases not wholly unlike the foregoing, in which, by inference from some of the authorities, the plaintiff in an action of deceit may perhaps be exempted from proving the *scienter*. These are cases of representations by persons who have made a specialty of some particular department of labor or science, or professing to have done so, claim the possession of peculiar skill or knowledge therein, and an ability to act concerning it as experts. It is probable that redress may be obtained in the courts against such persons for damage sustained by reason of false representations within the range of their specialty, without giving proof that such representations were known to be false, in so far as they consisted in the statement of specific facts, susceptible of actual knowledge.

[If, for instance, in the negotiations for the sale of a piece of land by a geologist, the vendor should positively but falsely affirm certain substances in the soil, having an oily appearance, to arise from deposits of native mineral oil in the premises, and the purchaser, having no knowledge on the subject, should rely upon the statements made as those of a geologist, it would not (probably) be contrary to legal principles to hold the vendor liable for the damage sustained in the purchase, though the purchaser could not prove that the representation was made with knowledge of its falsity.]

¹ Morgan v. Skiddy, 62 N. Y. 319.

² *Ib.*

If, however, the representation be not of specific facts, capable of actual knowledge, it matters not how far superior in skill or knowledge, or in the profession thereof, the party making the representation may be to him to whom the same is made: the injured party cannot recover damages without proving the *scienter*. [For example: The defendant falsely represents the growth, appearance, and vitality of willow cuttings, and the plaintiff relying thereon as the statements of an expert, buys a quantity. He cannot recover for the damage sustained without proving the *scienter*.¹]

There are some other circumstances under which a breach of this duty arises, though the representation is made without a knowledge of its falsity. If the defendant made the representation positively, without knowing whether it was true or false, he cannot be excused from liability; since the positive assertion of a fact is by plain implication an *assertion* of knowledge concerning such fact.² Hence, if (contrary to his assertion) he had no knowledge about the fact, he has asserted for true what he knew to be false. Such a representation differs not, in contemplation of law, from a false statement of fact made by a party who knew the true state of things.³

Cases like this, however, must be distinguished from cases in which a positive statement is made in the belief that it is true, when such belief is based upon information which would justify it. If, under such circumstances, the information upon which the representation was based should turn out incorrect, there would be no breach of duty, and hence no liability.⁴ But if the statement,

¹ Pike v. Fay, 101 Mass. 184.

² Preston v. Mann, 25 Conn. 118, 129.

³ Evans v. Edmonds, 13 Com. B. 777, 786; Beattie v. Ebury, Law R. 7 H. L. 102; Lobdell v. Baker, 1 Met. 193, 201; Bennett v. Judson, 21 N. Y. 138; Stone v. Covell, 29 Mich. 359.

⁴ Brooks v. Hamilton, 15 Minn. 26; Fairbault v. Sater, 13 Minn.

though believed to be true, be based upon totally inadequate information, such as mere rumors, or upon no information at all, the contrary is true; and for the reason above stated, that positive statements imply a profession of actual knowledge.

By way of summary, the doctrines concerning the *scienter* may be thus stated: An action for deceit may be maintained (other elements present); (1) for a false representation, known by the defendant to be false; (2) for a false representation believed to be true, but the truth of which he was bound to know; (3) for a false representation not believed to be either true or false; (4) for a false representation believed to be true, but upon no, or inadequate, grounds.¹

§ 4. OF THE IGNORANCE OF THE PLAINTIFF, AND HIS BELIEF IN THE TRUTH OF THE REPRESENTATION.

The next element of the breach of duty is that requiring the plaintiff to have been ignorant of the truth of the matter concerning which the representation was made, and to have believed that it was true.

Both of these situations must, in general, be true of the plaintiff: he must have been ignorant of the true state of things, and have trusted the representation of them as made by the defendant. He must have been deceived; and to render the defendant liable, the plaintiff must have been deceived by the defendant. If he (the plaintiff)

223, 231; *Taylor v. Leith*, 26 Ohio St. 428; *Botsford v. Wilson*, 75 Ill. 132.

¹ It should be observed that *innocent* material misrepresentations will furnish ground in almost any case for objecting to the enforcement of a *contract* effected through the influence of them, and even for a rescission of the contract; but this is commonly upon the ground of mistake, and not upon the ground of fraud (deceit), though the language of the cases is often very loose and inexact in this particular. See Bigelow, *Fraud*, pp. 61-63.

had notice or knowledge¹ of the truth; or if without notice or knowledge thereof he acted upon independent information, and not upon a belief of the truth of the *defendant's* representation, he is in the one case not deceived at all,² and in the other is not deceived by the person of whom he complains. And the burden of proving such facts rests upon the plaintiff.³

[Should a purchaser of property therefore make investigation of his own as to the truth of representations made by the vendor, he will be barred from alleging that the latter made false representations. But more, it will not be allowed the purchaser to say that, aside from express misrepresentations, the vendor concealed facts of importance to the purchaser; provided he did nothing to prevent the purchaser from making as ample investigation as he chose.⁴ [For example: The defendant, vendor of a large tract of land, represents the estate to contain only fifty or sixty acres of untillable soil, and the plaintiff, the purchaser, before the sale, examines all of the land more than once. The defendant (under the circumstances) is not guilty of a breach of duty to the plaintiff, though it turns out that the estate contains three hundred acres unfit for cultivation.⁵]

But (besides cases such as these) just as there are many cases in which the defendant, though in fact ignorant that he has made a false representation, and had supposed it to be true, is bound to know the facts, and may therefore be liable to the plaintiff; so there are many cases in which the plaintiff, though he was actually ignorant of the true

¹ There may be notice without knowledge; but notice has the same effect as knowledge.

² *Hagee v. Grossman*, 31 Ind. 223; *Tuck v. Downing*, 76 Ill. 71; *Whiting v. Hill*, 23 Mich. 399.

³ *Pasley v. Freeman*, 3 T. R. 51; s. c. *Bigelow's L. C. Torts*, 1.

⁴ *Halls v. Thompson*, 1 Smedes & M. 443.

⁵ *Halls v. Thompson*, *supra*.

state of facts and supposed the representation to be true, is considered by the law as fixed with knowledge of the facts, and cannot treat the conduct of the defendant as a breach of his legal duty.

The first case to be noticed under this aspect of the law of deceit is that in which the plaintiff, having the means directly at hand of informing himself of the truth of the matter in question, refuses or fails to make inquiry concerning the same. In such a case, the plaintiff is considered to have notice of the true state of facts; and notice is equivalent to knowledge.

In accordance with this principle, it is laid down as a broad proposition that, if the means of knowledge be directly at hand and equally available to both parties, the plaintiff, as a prudent man, must be deemed to have availed himself of such means, and hence has not been deceived by the defendant, so that (unless there was a warranty by the defendant) an action of deceit cannot be maintained against him. [For example: The plaintiff buys a quantity of rubber goods from the defendant at his shop or factory; the goods lying at hand in a condition for ample inspection or testing. The plaintiff cannot afterwards say that the defendant deceived him in respect of the quality of the goods, unless the defendant made a warranty thereof.¹ Again: The defendant, in selling to the plaintiff a manufacturing establishment, represents it to have a waterfall of about fifteen feet. The fall is, in fact, much less; but the plaintiff has for many years been one of the joint owners of the property, and has had ample means of knowing the truth, having at one time united in conveying the property and describing the extent of the fall of water. The defendant is not liable.²]

¹ *Ely v. Stewart*, 2 Md. 408.

² *Salem Rubber Co. v. Adams*, 23 Pick. 256. See *Brown v. Leach*, 107 Mass. 364; *Buck v. McCaughtry*, 5 T. B. Mon. 221.

If, however, the plaintiff was prevented from making inspection by the acts or arts or words of the defendant, the latter is guilty of a breach of duty, though the property might have been easily inspected. Every contracting party, when not in actual fault, has the right to rely upon the express statement of an existing fact, the truth of which is known, or presumed to be known, to the other contracting party who made it, and is unknown to the party to whom it is made, when such statement is the basis of a mutual agreement. He is under no obligation to investigate and verify the statement to the truth of which the other party to the contract, with knowledge or notice, has deliberately pledged his faith.¹ Indeed, a party may act upon the *express* representation of another, though the means of information be fully open to him;² provided such representation have a natural tendency to prevent him, as a man of prudence, from making further inquiry. [For example: The defendant, the vendor of land, makes to the plaintiff false representations concerning his title to the land in question. An examination of the registry of deeds would show the truth of the matter. The plaintiff may rely upon the express statements of the defendant, and is not bound to examine the registry books.³ Again: The defendant, in selling a patent, makes false representations to the plaintiff as to what the patent covers. The plaintiff may rely upon these representations, though an inspection of the records of the patent office would disclose their falsity.⁴]

¹ Mead v. Bunn, 32 N. Y. 275, 280; McClellan v. Scott, 24 Wis. 81, 87.

² Matlock v. Todd, 19 Ind. 130.

³ Parham v. Randolph, 4 How. (Miss.) 435; Kiefer v. Rogers, 19 Minn. 32; Holland v. Anderson, 38 Mo. 55. This is true, though there has been no eviction, and, by most of the authorities, though the defendant's deed contain covenants of warranty. Bigelow, Fraud, 68. In the *absence of fraud*, however, the rule would be different. *Ib.* p. 30.

⁴ David v. Park, 103 Mass. 501.

When the defendant induces the plaintiff to abstain from seeking information, mere concealment of material facts may become a breach of duty; and redress will not be refused in such a case merely because a sharp business man might not have been deceived. When a party practises arts designed to overreach another, and the latter without fault under the circumstances is defrauded, he is entitled to recover damages.¹ Nor is the rule of law different when the defendant suggests examination to the plaintiff, but in such a way as to indicate that such a step would be quite unnecessary. [For example: The defendant, in selling to the plaintiff property at a distance, suggests to the plaintiff that he go and look at the property "as their judgment might not agree, and, if not satisfied, he would pay the plaintiff's expenses, but if satisfied the plaintiff should pay them himself." This is deemed to justify the plaintiff in acting upon the defendant's representations without examining the property.²]

Not even the subsequent acts of accepting and paying for goods upon delivery will bar the purchaser of redress, though the goods were open to his inspection at the time, if such acceptance and payment were procured by fraudulent artifices on the part of the vendor. [For example: The defendant, a manufacturer and vendor of tobacco, knowingly uses damaged tobacco in the manufacture, and intentionally uses boxes of green lumber; and, while the tobacco is manufacturing, he exhibits to the plaintiff from time to time, in order to mislead him, specimens of tobacco as of the kind he (the defendant) is supplying the plaintiff, when in fact the defendant is supplying him with a different and inferior kind. Notwithstanding acceptance of the goods

¹ *Swimm v. Bush*, 23 Mich. 99; *Starkweather v. Benjamin*, 32 Mich. 305; *Roseman v. Canovan*, 43 Cal. 111.

² *Webster v. Bailey*, 31 Mich. 36.

and payment for them, the plaintiff is entitled to damages against the defendant.¹]

Even though a party sell at the risk of the purchaser, he will not be permitted to practise fraud upon him; and, if he do, he will be liable as for a breach of his legal duty to the purchaser. [For example: The defendant, in the course of selling a horse to the plaintiff, tells him that the horse has the distemper. The plaintiff replies that "he does not mind the distemper, but a glandered horse he would not have at all." The sale is made, and the defendant, before the plaintiff takes away the horse, tells the plaintiff he must take the animal at his own risk. The plaintiff, discovering the horse to have the glanders, may sue for deceit.²]

When the parties, by reason of physical or mental infirmity on the one side, or of the fact that the one party is in the occupation or management of the other's business, or has the general custody of his body, do not stand upon an equal footing, the objection to a suit for false representations, that the party to whom they were made was negligent in not making inquiry or examination, has still less force. [Examples of this class of cases may be readily found in the case of transactions with aged persons, or with *cestuis que trust* by trustees, or with wards by guardians.]

The plaintiff, when standing on an equality with the defendant, is doubtless bound to know the state of his own business, and the facts relating to his own circumstances or property, just as truly as is the defendant. This subject, however, need not be enlarged upon here, as it has been presented with sufficient fulness in treating of the defendant in the like situation.³

¹ *McAvoy v. Wright*, 25 Ind. 22. An act does not amount to the waiver of a wrong unless it be done with knowledge or notice of the wrong.

² *George v. Johnson*, 6 Humph. 36.

³ *Ante*, pp. 19-21.

A person in the full possession of all his faculties, and able to read, is bound to know and understand the contents of an instrument executed by him, or in his possession as a party to it, unless it contain technical or foreign terms, and he has been misled as to their meaning by the opposite party. [Such a person cannot, therefore, in the absence of fraud, say that he did not read an instrument conferring rights or imposing duties upon him, and that the other party falsely stated its terms to him.¹]

A person who cannot read should require a contract about to be signed by him to be read to him; and if he do not, it is doubtful if he can complain that the contents of the writing were falsely stated to him.² [It is held, however, that one who can read only with great difficulty may rely upon the statements of the opposite party as to such of the contents of a printed document as were in very small type.³ But it should seem that prudence would require the plaintiff to have insisted upon the reading to him of the document or the particular passages in question, since to state the substance of the contents requires the use of inference, which may often be a matter of the nicest discrimination. At all events, it seems clear that an action of deceit could not be maintained unless the plaintiff could show that the defendant had knowingly and purposely misrepresented the contents of the document.]

Cases of this sort, however, are to be distinguished from those in which a person is by trick or artifice caused to

¹ *Rogers v. Place*, 35 Ind. 577; *Bacon v. Markley*, 46 Ind. 116; *Hawkins v. Hawkins*, 50 Cal. 558. The same proposition would hold equally true if a question should arise against the defendant instead of against the plaintiff, whose duties are now more particularly under consideration. But it is apprehended that the doctrine commonly affects the plaintiff, and hence it is considered under the present instead of the preceding section.

² Compare *Craig v. Hobbs*, 44 Ind. 363.

³ *Keller v. Equitable Ins. Co.*, 28 Ind. 170.

sign a different instrument from that to which he intended to give his signature; as where one paper is surreptitiously substituted for another. The doctrine concerning the reading a document, or the requiring it to be read, can have no application to such a case; and if the defrauded party choose to treat the transaction as having effected a contract (a right which the defrauded party, and he alone, may always exercise), it is clear that he can maintain an action of deceit for the wrong which has been committed.¹

§ 5. OF THE INTENTION THAT THE REPRESENTATION SHOULD BE ACTED UPON.

As to that element of the breach of duty under consideration which requires the plaintiff to prove that the defendant intended his representation to be acted upon, it is to be observed that, while the rule is probably inflexible,² its force appears chiefly in those cases in which the deception was practised with reference to a negotiation with a third person, and not with the defendant. In cases of this kind, an instance of which is found in false representations to the plaintiff of the solvency of a third person,² it is plain that the transaction with such third person, though shown to have been caused by the defendant's false representation, affords no evidence of an intention in the defendant that the representation should be acted upon by the plaintiff. It would be perfectly consistent with mere evidence that the plaintiff acted upon the defendant's misrepresentation in a transaction with a third person, that the defendant, though he knew the falsity of his representation, did not know that the plaintiff was about to act upon it. The representation might, for all this, have been a mere idle falsehood; such as would not justify any one in acting upon it.

¹ For a detailed consideration of this and kindred subjects, see Bigelow, *Fraud*, 73-81.

² *Ante*, p. 15.

It follows that where a party complains of false representations, whereby he was caused to suffer damage in a transaction with some third person, it devolves upon him to give express evidence that the defendant intended that he should act upon the representation, or that the plaintiff was justified in inferring such intention; and that it is not enough to prove that the misrepresentation was made with knowledge of its falsity.¹

When, however, the effect of the false representation was to bring the plaintiff into a business transaction with the defendant, the case is quite different. Proof of such a fact shows at once the intent of the defendant to induce the plaintiff to act upon the representation; and it follows that express evidence of an intention to this effect is unnecessary. This is the meaning of many cases which hold it not incumbent upon the plaintiff in an action for deceit, after proof of the other elements of the breach of duty, to give evidence indicating an intent to deceive.

The principle appears most frequently in cases of sales; the rule of law being, that if the plaintiff, the purchaser, establish the fact that the defendant, the vendor, knew that his representation was false, it is not necessary for the plaintiff to give other evidence to show that the defendant intended to mislead the plaintiff. That is already proved.² [For example: The defendant sells a horse as sound, knowing that he is not sound. Further evidence to show the existence of an intent to defraud the plaintiff is not necessary.³]

It is important to notice that in one class of cases it is not necessary that it should appear that the defendant should have intended to *injure* the plaintiff. It has already been stated that a person honestly professing to

¹ See *Pasley v. Freeman*, 3 T. R. 51; s. c. *Bigelow's L. C. Torts*, 1.

² *Collins v. Denison*, 12 Met. 549; *Johnson v. Wallower*, 15 Minn. 474; s. c. 18 Minn. 288.

³ *Johnson v. Wallower*, *supra*.

have authority to act for another is liable as for fraud for the damages sustained, if he have not the authority.¹ And, in such cases, it is obvious that the representation may have been made for the benefit of the plaintiff.²

§ 6. OF ACTING UPON THE REPRESENTATION.

It is fundamental that the defendant's representation should have been acted upon by the plaintiff to his injury to enable him to maintain an action for the alleged breach of duty.³ Indeed, fraudulent conduct or dishonesty of purpose, however explicit, will not afford a cause of action unless shown to be the very ground upon which the plaintiff acted to his damage.⁴ The *defendant* must have caused the damage.

So strong is the rule upon this subject that it is deemed necessary that the damage as well as the acting upon the representation must have already been suffered before the bringing of the suit, and that it is not sufficient that it may occur. [For example: The defendant induces the plaintiff to indorse a promissory note before its maturity by means of false and fraudulent representations. An action therefor cannot be maintained before the plaintiff has been compelled to pay the note.⁵

A person who has been prevented from effecting an attachment upon property by the fraudulent representations of the owner or of his agent is deemed to have suffered no legal damage thereby, though subsequently another creditor should attach the whole property of the debtor and sell it upon execution to satisfy his own debt.⁶

¹ *Ante*, pp. 19, 20.

² See *Polhill v. Walter*, 3 Barn. & Ad. 114.

³ *Pasley v. Freeman*, 3 T. R. 51; s. c. *Bigelow's L. C. Torts*, 1; *Freeman v. Venner*, 120 Mass. 424.

⁴ *Rutherford v. Williams*, 42 Mo. 18.

⁵ *Freeman v. Venner*, *supra*.

⁶ *Bradley v. Fuller*, 118 Mass. 239.

The person thus deceived, having acquired no lien upon or right in the property, cannot lose any by reason of the deceit. The most that can be said of such a case, it has been observed, is that the party intended to attach the property, and that this intention has been frustrated; ¹ and it could not be certainly known that that intention would have been carried out.² If the attachment had been already levied and was then lost through the deceit, the rule would of course be different.³]"

It must appear, moreover, that the *plaintiff* was entitled to act upon the representation; and this will depend upon the intention of the defendant. The representation may have been intended for (1) one particular individual only (in which case he alone is entitled to act upon it), or (2) it may have been intended for several or for many, or (3) for any one of a class, or (4) for any one of the public. In either of the second or third cases, any one who comes properly within the number or class intended, or, in the fourth case, any one of the public, will be entitled to redress for any damage sustained by acting upon the representation.⁴ [For example: The defendants put forth a prospectus to the public, containing false representations for the purpose of selling shares of stock in their company. The plaintiff, as one of the public, may act upon the representations, and, having bought stock of the *company*, recover damages for the loss sustained thereby.⁵]

§ 7. OF SLANDER OF TITLE AND TRADE-MARKS.

The foregoing presentation of the law supposes that the representation was made to or for the plaintiff. But there

¹ *Ib.*; *Lamb v. Stone*, 11 Pick. 527.

² *Bradley v. Fuller*, *supra*.

³ *Ib.*

⁴ *Swift v. Winterbotham*, Law R. 8 Q. B. 244; *Peek v. Gurney*, Law R. 6 H. L. 377.

⁵ As to this point see *Bigelow*, *Fraud*, 90, and note.

is another class of cases, with several branches, in which the situation is different. A representation may be made *of* a man or *of* his property to his injury, as well as *to* him; still this class of cases (probably) stands upon the same footing as those which have been under consideration.¹

False representations *of* a person may consist either (1) in disparaging his credit, or the title to his property, or his property itself, or (2) in attempts to personate him or his badge of business. The subject of misrepresentations made to the plaintiff of the credit of a third person has been considered;² and (in principle) there is no difference between such a case and that of misrepresentations to a third person of the plaintiff's pecuniary standing. The representation having been acted upon to the plaintiff's damage by the person to whom the defendant made it, the latter is liable for the former's loss.

If the representation relate to the plaintiff's title to property or to the quality of the property itself, the wrong done is termed slander of title; if it be an attempt to personate him or the reputation of his goods in business, it will commonly be the case of an infringement of his trade-mark.³

In the so-called action for slander of title, it devolves upon the plaintiff to prove that the statement of the de-

¹ See Bigelow's L. C. Torts, 54-59, 69-72.

² *Ante*, pp. 15, 16.

³ An infringement of a patent, it should be observed, is not so much an attempt to obtain the benefit of another's reputation in business as to make and vend the very same article, to do which an exclusive right has been given to another. There is no necessary attempt to deceive any one in the infringement of a patent; and the same is measurably true of infringements of copyrights. These subjects, therefore, do not belong to the law of deceit. An invasion of a patent or a copyright is simply an invasion of a right of property, like a trespass upon real estate. Indeed the same is, to some extent, true of trade-marks. *Leather Cloth Co. v. American Leather Cloth Co.*, 4 DeG. J. & S. 137.

fendant was made with actual malice,¹ and that it has been accompanied with some actual, specific damage.²

The interpretation put upon these elements by the authorities shows that they are substantially equivalent to the corresponding elements of the ordinary action of deceit. The false representation (which clearly must have been material, and otherwise of the nature of the representation above considered) must have been made with knowledge of its falsity and with intent to deceive; this being the meaning of the "actual malice" above mentioned.³ [For example: The defendant states to a third person with whom the plaintiff has made a contract for the sale of certain lands, that "his [the plaintiff's] title to those estates will hereafter sooner or later be contested. At the time they were sold Mr. Y. [the plaintiff's vendor], he was not in a state of soundness and competency to do so." The defendant makes this statement as trustee of the particular lands, in good faith, believing it to be true. This is no breach of duty to the plaintiff.³ The same case would afford an example of the necessity of proof of actual damage by supposing that the plaintiff had not been negotiating for the sale of the lands at the time of the statement.⁴]

And the question of the defendant's liability must turn, further, upon the evidence as to whether the third person, to whom the defendant made the false statement, was deceived by and acted upon that *particular* statement. If such person knew the truth of the matter, or acted upon other information regardless of the defendant's statement,

¹ *Pater v. Baker*, 3 Com. B. 831, 868; *Pitt v. Donovan*, 1 Maule & S. 639; *McDaniel v. Baca*, 2 Cal. 326; *Stark v. Chitwood*, 5 Kans. 141.

² *Malachy v. Soper*, 3 Bing. N. C. 371. See Bigelow's L. C. Torts, 54-59.

³ *Pitt v. Donovan*, *supra*.

⁴ *Malachy v. Soper*, *supra*.

the latter could not be deemed in any proper sense to have caused the damage of which the plaintiff complains.¹

With regard to the law of trade-marks (using this as a generic term to cover all kinds of signs and badges of business), similar observations are to be made. In order to sustain an action of deceit for a breach of duty by the defendant to the plaintiff in the use of a trade-mark, it must appear (1) that the defendant knew of the existence of the plaintiff's mark when he committed the alleged wrong, (2) that he intended to palm off the goods as the goods of the plaintiff, or to represent that the business which he was carrying on was the plaintiff's business, or business of which the plaintiff had a special patronage, (3) and that the public were deceived thereby.² [For example: The defendant sells a medicine labelled "Dr. Johnson's ointment," — a label which the plaintiff had previously used, and was still using when the defendant began to make use of the same. The plaintiff cannot recover without showing that the defendant has used the label for the purpose of indicating that the medicine has been prepared by the plaintiff.³ Again: The defendant has the words "Revere House" printed upon coaches which he employs to carry passengers from the railway station to a hotel of that name. The plaintiff has the exclusive right, by contract with the proprietor of the hotel, to represent himself

¹ See *Pitt v. Donovan*, 1 Maule & S. 639; *Pater v. Baker*, 3 Com. B. 831, 868; *Wren v. Weild*, Law R. 4 Q. B. 730; *Bigelow's L. C. Torts*, *ut supra*.

² *Sykes v. Sykes*, 3 Barn. & C. 541; *Marsh v. Billings*, 7 Cush. 59; *Rodgers v. Nowill*, 5 Com. B. 109. See *Bigelow's L. C. Torts*, 59–72. In a proceeding for *injunction* it is not necessary to prove the defendant's knowledge or intent to deceive. Simple priority of use of the mark is enough. See *Millington v. Fox*, 3 Mylne & C. 338; *Bigelow's L. C. Torts*, 70, 71.

³ *Singleton v. Bolton*, 3 Doug. 293. This supposes, of course, that the medicine was not patented.

as entrusted with the patronage of the hotel by the proprietor. The defendant commits no breach of duty to the plaintiff, unless he so makes use of the sign upon his coaches as to indicate that the proprietor of the hotel has granted him such a right of patronage.¹]

It will thus be seen that this subject differs in no essential particular from ordinary deceit.

¹ Marsh v. Billings, *supra*.

CHAPTER II.

SLANDER AND LIBEL.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty to forbear to publish defamation of him.

OBSERVATIONS.

1. Language or representation actionable *per se* is actionable without the proof of special damage or of actual malice.

2. Legal slander or libel is actionable *per se*.

3. The term "representation" is now used to denote painting, picture, sign, or effigy.

4. Slander is (oral) defamation. *addressed to the ear*

5. Libel is defamation (by writing, printing, or representation.) *addressed to the eye*

6. Publication is the utterance or exhibition of defamation before a third person or persons.

7. The last three observations are intended merely for general definition. What the term "defamation" itself means will be made known by the proposition of law following, and the consideration of its parts.

8. Whenever language is spoken of as defamatory, it is to be understood as false.

The general proposition of law is, that the above-stated duty is violated by A by the publication of words, language, or representations of a false and defamatory character concerning B in either of the five following ways:

(1) where A imputes to B the commission of an indictable offence involving turpitude; (2) where he imputes to B the having a contagious or infectious disease of a disgraceful kind; (3) where he makes an imputation concerning B in respect of his office, business, or occupation; (4) where he makes an imputation concerning B tending to disinherit him; (5) where the defamation is a libel. Each of these classes of defamation must be examined.

§ 2. OF THE INTERPRETATION OF LANGUAGE.

Before proceeding to the consideration of any of these classes of breaches of duty, it should be observed that, subject perhaps to one exception, the language or representation complained of is to be understood in its natural and usual signification, when brought before the court (judge) for interpretation, and in the signification in which the persons who heard or read or saw it, as men of ordinary intelligence, would understand it. It is not to be construed in a milder sense (*mitiori sensu*) merely because it is capable by a forced construction of being interpreted in an innocent sense. [For example: The defendant publishes of the plaintiff the following words: "You are guilty of the death of D." This is an imputation of the commission of murder, and is not to be construed *mitiori sensu*.¹]

It should, however, be sufficiently clear that the imputation was slanderous or libellous (according to its nature) within the meaning of some one of the stated five classes. If this be not the case it will not be deemed a breach of the duty; and this, too, whether the question of interpretation come before the court or before the jury. In one case, at least, the interpretation adopted has been apparently contrary to the understanding of men of ordinary intelligence; and that is where an imputation is made of what would ordinarily be understood as perjury, but the

¹ *Peake v. Oldham*, 1 Cowp. 275; s. c. Bigelow's L. C. Torts, 73.

language of which does not necessarily import perjury in the legal sense. [For example: The defendant publishes of the plaintiff the following words: "He has taken a false oath against me in Squire Jamison's court." This is deemed not to be an imputation of the commission of perjury;¹ the term "perjury" signifying the taking of a false oath knowingly, before a court of justice, with reference to a cause pending.]

It follows that it is immaterial whether the defamatory charge be affirmative and direct or indirect so as to be matter of inference merely, or that it is ironical, or that it is made in allegory or hieroglyphics or other artful disguise. It is enough that the charge, criminating in law, is understood to be defamatory by those to whom it is addressed, being men of average intelligence.

§ 3. OF THE PUBLICATION OF DEFAMATION AND SPECIAL DAMAGE.

In accordance with observation 6, *supra*, it should be noticed that defamation is not published when addressed only to the plaintiff. That is, the language or representation cannot in such a case be actionable *per se*. And this is true, though the alleged wrong be directly followed by great dejection of mind on the part of the plaintiff, and consequent sickness and inability to carry on his usual vocation, and expense attending upon his restoration to health or upon the employment of help to carry on his business. [For example: The defendant says to the plaintiff, "You have committed adultery with F." The plaintiff, a farmer, suffers immediate distress of mind and body, becomes sick and unable to attend to his work, his crops suffer, and he is compelled to employ extra help to carry on

¹ Ward v. Clark, 2 Johns. 10; s. c. Bigelow's L. C. Torts, 81. The offence charged should amount to crime in contemplation of law, not merely in the understanding of the hearer.

necessary work. The defendant has not violated any legal duty to the plaintiff, and is not liable for the defamation.¹

Indeed, if the language or representation complained of be not actionable *per se* (that is, if it be not actionable without the proof of some special damage), the fact that the publication of the defamation occurred in the presence of a third person who (by authority) reported it to the plaintiff with the foregoing result, does not make the defamer liable, unless actual damage followed.²

This, however, proceeds upon the ground that the effect of distress merely is not such damage as the law requires when the defamation is not actionable *per se*. The rule of law upon this subject is, that defamation not actionable *per se* (that is, defamation not included under any of the five above heads) may be a breach of duty if it be attended with special damage. But special damage (and damage of a general nature as well) must be the natural and usual result of the wrong complained of, just as effect follows a true cause; and, in relation to defamation, it is deemed that nothing else than damage resulting from injury to ^{reputation} ~~character~~ comes within the principle.³ Damage resulting from *fear* of injury to character, or from wounded feelings, is not alone damage to character, since character can only be injured when it has been defamed before a third person; except in that it may have been injured in the eyes of the defendant himself: but for this the defendant is not legally liable.

The damage complained of must then in all cases, whether general or special, have been sustained through

¹ Compare *Terwilliger v. Wands*, 17 N. Y. 54, 63, and *Wilson v. Goit*, *Ib.* 442, which, taken together, justify the example.

² *Terwilliger v. Wands*, 17 N. Y. 54, 63, reaffirmed in *Wilson v. Goit*, *Ib.* 442, and overruling *Bradt v. Towsley*, 13 Wend. 253, and *Fuller v. Fenner*, 16 Barb. 333.

³ This is to be understood as the ground commonly taken, however difficult it may be to sustain it in logic.

the action of a third person. Special damage may result in several ways, so as to make the publication of defamation actionable when it would not be actionable *per se*, [as by the loss of a marriage. For example: The defendant charges the plaintiff, an unmarried female, with unchastity in the presence and hearing of C, to whom the plaintiff is engaged to be married. C, in consequence of the charge, immediately terminates the engagement. The defendant is liable to the plaintiff.¹

The same would be true of the loss of the *consortium* of a husband.² The same would also be true of the refusal to the plaintiff of civil entertainment at a public house.³ So of the fact that the plaintiff has been turned away from the house of her uncle, and charged not to return until she shall have cleared up her character; ⁴ and so in general of the loss by the plaintiff even of gratuitous hospitable entertainment.⁵]

The special peculiarity of the law of slander and libel arises, however, in the case of defamation actionable *per se*; and the consideration of the special phases of such defamation will now follow. But let it be again observed, that in defamation arising under any of the heads now to be separately examined, the plaintiff establishes the breach of duty, and consequently his right to recover, without proof of actual damage or of actual malice.

§ 4. OF THE IMPUTATION OF HAVING COMMITTED AN INDICTABLE OFFENCE INVOLVING TURPITUDE.

The authorities are at variance concerning the nature of the offence the false imputation of having committed which is a breach of legal duty. It is held by many of the courts

¹ See *Terwilliger v. Wands*, 17 N. Y. 54, 60.

² *Lynch v. Knight*, 9 H. L. Cas. 577.

³ *Olmsted v. Miller*, 1 Wend. 506.

⁴ *Williams v. Hill*, 19 Wend. 305.

⁵ *Ib.*; *Moore v. Meagher*, 1 Taunt. 39.

that unless the offence charged, besides involving turpitude, be one the punishment ~~of conviction~~ for which is infamous, the charge does not come under the head now under consideration.¹ That is, it must be indictable. And by such authorities a ~~punishment for~~ crime is not infamous when it is named in the same category with ~~the punishment of~~ offences of a comparatively trivial nature, as that of vagrants, beggars, jugglers, and fortune-tellers.² If, then, the offence charged be classed with trivial offences, such as those mentioned, the imputation of having committed it, though false, is not by these authorities actionable. [For example: The defendant publishes of the plaintiff the words, "She is a common prostitute." The punishment of this offence is classed with the punishment of vagrants, beggars, and fortune-tellers. It is not actionable, therefore, when not attended with special damage.³]

By other courts this rule has been rejected, and the following adopted: Whenever an offence has been charged which, if proved, may subject the party to a punishment, though not ignominious, which would bring disgrace upon him, the accusation, if false, is actionable.⁴ That is, the offence charged need not be indictable to support an action.

It is generally conceded, however, that it is not necessary that the accusation should be that of the commission

¹ *Brooker v. Coffin*, 5 Johns. 188; s. c. *Bigelow's L. C. Torts*, 77; *Andres v. Koppenheaver*, 3 Serg. & R. 255; *Holt v. Scholifield*, 6 T. R. 691, 694; *Odgers, Slander*, 54.

² It should rather be said that the *offence*, not the punishment, is or is not infamous by this standard, at least when imprisonment may be imposed. There is no difference in kind between imprisonment for one month and imprisonment for one year.

³ *Brooker v. Coffin*, *supra*.

⁴ *Miller v. Parish*, 8 Pick. 384. See *Frishie v. Fowler*, 2 Conn. 707; *Meyer v. Schleicher*, 29 Wis. 646. *Quære* as to the effect of an accusation of this kind, which should show that the punishment had already been suffered. The degradation, not the danger of punishment, is generally considered a test of liability. See p. 44.

of a high crime. The false imputation that the plaintiff has committed a misdemeanor is equally a breach of legal duty, provided it be an act involving moral turpitude.¹ [For example: The defendant publishes of the plaintiff the words, "You have removed my landmark, and cursed is he that removeth his neighbor's landmark." The plaintiff may maintain an action for the same.²]

The authorities are not altogether in harmony as to whether it is also a test of liability that the charge, if true, would subject the object of it to punishment, or whether the test in this particular is the degradation involved; but the weight of authority favors the latter as the test, and not the former. Although, then, the charge show that the punishment has already been suffered, and do not render the plaintiff liable to indictment, the degradation involved in the (false) accusation renders the defendant liable.³ [For example: The defendant says of the plaintiff, "Robert Carpenter [the plaintiff] was in Winchester jail, and tried for his life, and would have been hanged had it not been for L., for breaking open the granary of farmer A., and stealing his bacon." The defendant is liable.⁴ Again: The defendant says of the plaintiff, "He was arraigned at Warwick for stealing of twelve hogs, and, if he had not made good friends, it had gone hard with him." The defendant is liable.⁵ Again: The defendant says of the plaintiff, "He is a convict, and has been in the Ohio penitentiary." The plaintiff is entitled to maintain an action therefor, the words being false.⁶]

¹ *Young v. Miller*, 3 Hill, 21; *Smith v. Smith*, 2 Sneed, 473; *Beck v. Stitzel*, 21 Penn. St. 522.

² *Young v. Miller*, *supra*.

³ *Shipp v. McCraw*, 3 Murph. 465; *Smith v. Stewart*, 5 Barr, 372.

⁴ *Carpenter v. Tarrant*, Cas. Temp. Hardw. 339. The words were false.

⁵ *Halley v. Stanton*, Crok. Car. 268. The words were false.

⁶ *Smith v. Stewart*, 5 Burr, 372. It would be otherwise if the words were true. *Baum v. Clause*, 5 Hill, 199.

§ 5. OF THE IMPUTATION OF HAVING A CONTAGIOUS OR INFECTIOUS DISEASE OF A DISGRACEFUL KIND.

By the early common law, a charge to come under this head, must have been of the having the leprosy, or the plague, or the syphilis. At the present time, the duty has come to be so far enlarged as to require the forbearance from publishing false accusations concerning another of the having any disease of a contagious or infectious nature involving disgrace. [For example: The defendant falsely charges the plaintiff with having the gonorrhœa. This is actionable *per se*.¹]

This doctrine of law proceeds upon the ground that charges of such a kind tend to exclude a person from society; and the rule requires the charge to be made in the present tense. To accuse another of ~~the~~ having had a disgraceful disease is not actionable without proof of special damage. [For example: The defendant says of the plaintiff, "She has *had* the pox." The defendant is not liable though the charge be false, unless the plaintiff prove some specific damage.²]

A false charge, however, of ~~the~~ having had a disgraceful disease may be actionable if it imply an offence under one of the other heads of the present chapter. The commission of adultery is in this country indictable, and a false charge that a person has committed it is generally held actionable *per se*.³ Hence to impute to a man falsely the having had a venereal disease from connection with a married woman is actionable; but that proceeds upon the ground that the offence is indictable.

¹ Watson v. McCarthy, 2 Kelly, 57.

² See Carslake v. Mapledoram, 2 T. R. 473; s. c. Bigelow's L. C. Torts, 84.

³ It appears to be otherwise in England. Ayre v. Craven, 2 Ad. & E. 7. Adultery there, however, is not indictable, but punishable in the spiritual court.

§ 6. OF AN IMPUTATION AFFECTING THE PLAINTIFF IN HIS OFFICE, BUSINESS, OR OCCUPATION.

In order that defamation arising under this head alone should be actionable *per se*, it should have a natural tendency to injure the party complaining in his occupation. It is not enough that it may possibly so injure him. If it have not a natural tendency to injure him in this respect, that is, if it would not be the usual effect of the charge to injure the plaintiff in his occupation, as by causing removal, the plaintiff cannot recover without proving a special damage. [For example: The defendant publishes of the plaintiff, a clerk to a gas-light company, the words, "You are a disgrace to the town, unfit to hold your situation for your conduct with harlots. You are a disgrace to the situation you hold." The plaintiff cannot recover without proof of actual damage, the language not having a natural tendency to cause the plaintiff's discharge from his employment.¹]

Defamation has a natural tendency to injure the plaintiff in his office, business, or occupation, within the meaning of the rule, when it strikes at his qualification for the performance of the duties of his situation, or when it alleges some misconduct or negligence in the course of transacting these duties.² [For example: The defendant charges the plaintiff, a clergyman, holding the office of pastor of a church, with incontinence. This may be ground of an action.³ Again: The defendant says of the plaintiff, a lawyer, the words having relation to the plaintiff's professional qualifications, "He is a dunce." This may be treated as a breach of the defendant's legal duty to the plaintiff.⁴]

When the defamation complained of does not show on

¹ Lumby v. Allday, 1 Tyrwh. 217; s. c. Bigelow's L. C. Torts, 87.

² *Ib.*

³ Gallwey v. Marshall, 9 Ex. 294.

⁴ Peard v. Jones, Croke Car. 382.

its face that it was published of the plaintiff in relation to his occupation, this must be made to appear;¹ though even then, as has been stated, the defamation will not be actionable unless it had a natural tendency to injure the plaintiff in his occupation, in the sense already explained. In cases, however, in which the imputation is alleged to have been made of the plaintiff in his occupation, when the same does not have the natural tendency mentioned, it may be shown by the plaintiff that the defamation *was* published under circumstances which bring the case within the rule of liability. But without such evidence, the plaintiff must fail. [For example: The defendant charges the plaintiff, as a physician, with incontinence. This does not imply disqualification, or necessarily professional misconduct; and, without evidence connecting the imputation with the plaintiff's professional conduct, he cannot recover.²]

If the imputation in itself come within the rule of liability under this head, it matters not that it was published of a servant, even one acting in a menial capacity. [For example: The defendant utters the following of the plaintiff, a menial servant, before the latter's master, "Thou art a cozening knave, and hast cozened thy master of a bushel of barley." The defendant is liable to the plaintiff, the imputation being false.³]

It is probably actionable to impute disqualification of a person holding a merely honorary or confidential office, not of emolument.⁴ It certainly is so to impute to such a person misconduct in the office.⁵ [For example: The defendant says of the plaintiff, who holds a public office

¹ *Ayre v. Craven*, 2 Ad. & E. 7.

² *Ib.*

³ *Seaman v. Bigg*, Croke Car. 480.

⁴ *Onslow v. Horne*, 3 Wils. 186.

⁵ *Ib.*

of mere honor, "You are a rascal, a villain, and a liar." This is a breach of the duty under consideration. ¹]

In all cases included under the present section, it is necessary that the plaintiff should have been in the exercise of the duties of the particular office, business, or occupation at the time of the ~~alleged~~ publication of the defamation.² [For example: The defendant says of the plaintiff, who had been a lessee of tolls at the time referred to by the defendant, "He was wanted at T.; he was a defaulter there." The words are not actionable *per se*.³]

§ 7. OF AN IMPUTATION TENDING TO DISINHERIT THE PLAINTIFF.

[If the words tend to impeach a present title of the plaintiff, the action, though commonly called an action for *slander* of title, is not properly speaking an action of slander: as has already been stated, such a case is simply an action for deceit, to be governed by the rules of law prevailing upon that subject.⁴]

Cases of actions for defamation tending to defeat an expected title are rare, and appear to have been confined to charges impeaching the legitimacy of birth of an heir apparent. Such an imputation is deemed actionable in England, as being likely to cause the plaintiff's disinheritance. [For example: The defendant publishes of the plaintiff, an heir apparent to estates, the words, "Thou art a bastard." The defendant is liable without proof of special damage.⁵]

¹ *Aston v. Blagrove*, Strange, 617.

² *Bellamy v. Burch*, 16 Mees. & W. 590; *Gallwey v. Marshall*, 9 Ex. 294.

³ *Bellamy v. Burch*, *supra*. Some of the old cases are *contra*, but they were overruled.

⁴ See *ante*, p. 33.

⁵ *Humphreys v. Stanfield*, Croke Car. 469.

§ 8. OF AN IMPUTATION CONVEYED BY WRITING, PRINTING,
OR REPRESENTATION ; THAT IS, OF LIBEL.

The four preceding sections exhaust the possible heads of oral defamation, actionable *per se* ; that is, of slander. Libellous defamation may also be conveyed in any of the four ways above considered ; but it may also be conveyed in other ways. A libel is a censorious or ridiculing writing, print, picture, or sign, made with a mischievous intent towards government, magistrates, or individuals.¹

The law of libel is, therefore, of wider extent than that of slander. Many words when written or printed become actionable *per se* which, if they had been orally published, would not have been actionable without proof of actual damage. And, besides these, there is the whole class of defamatory representations (picture, effigy, or sign), which in their nature are incapable of oral publication. The rule, as the above definition implies, is that the publication of words or representations which tend to bring the plaintiff into ridicule, hatred, or disgrace, is a breach of duty, though there might have been no liability for the same had they been orally published.² [For example : The defendant writes and publishes of the plaintiff the following : “ I sincerely pity the man that can so far forget what is due not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods.” The plaintiff can maintain an action for libel.³ Again : The defendant prints the following of the plaintiff : “ Our army swore terribly in Flanders, said Uncle Toby ; and if Toby was here now, he might say the same of some modern swearers. The man at the sign of the Bible [the plaintiff] is no slouch at

¹ *Steele v. Southwick*, 9 Johns. 214.

² *Thorley v. Kerry*, 4 Taunt. 355 ; s. c. Bigelow's L. C. Torts, 90 ;
Stone v. Cooper, 2 Denio, 299.

³ *Thorley v. Kerry*, *supra*.

swearing to an old story." The imputation, being false, is libellous, though not importing perjury.¹ Again: The defendant prints the following of the plaintiff: "Mr. Cooper [the plaintiff] will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor in Otsego, for he is known there." The publication of this language is deemed libellous.²

At common law, no immunity is conferred upon the proprietors, publishers, editors, or sellers of books, newspapers, or other prints for the publication of defamation. They are liable for the publication of libellous matter in their prints, though the publication may have been made without their knowledge or against their orders.³ If, however, the alleged libel were of such a nature that a man of common intelligence could not know that it was intended for a libel, and it was not in fact known that it was, neither the editor nor the proprietor of the printing establishment, nor the seller of that which contained the language or representation complained of, would be liable.⁴

§ 9. OF THE TRUTH OF THE CHARGE.

The truth of the charge, whether it was made orally or by printed or written language, is at common law a good defence to an action for the publication of alleged defamation, though malicious and not reasonably believed to be true, at least if oral.⁵ Evidence of such a fact shows, indeed, that the charge is not defamatory. A person has no right to a false character; and his real character suffers no damage, such at least as the law recognizes, from speaking the truth.

¹ *Steele v. Southwick*, 9 Johns. 214.

² *Cooper v. Greeley*, 1 Denio, 347.

³ *Dunn v. Hall*, 1 Ind. 344; *Huff v. Bennett*, 4 Sandf. 120.

⁴ *Smith v. Ashley*, 11 Met. 367.

⁵ *Foss v. Hildreth*, 10 Allen, 76; *King v. Root*, 4 Wend. 113.

This rule goes to the extent of justifying a party in publishing of another the fact that he has suffered the penalty of the law for the commission of crime, even though he may have been pardoned therefor and have since become a good and respectable citizen. [For example: The defendant publishes of the plaintiff the statement that the latter had several years ago stolen an axe. That is true, though, after conviction thereof, the plaintiff was pardoned, and has since become a trusted citizen and an office-holder. The accusation is deemed justifiable in law.¹]

Belief in the truth of the accusation, however, is not a defence,² though it is provable in mitigation of damages.³ And this is equally true of the editors and publishers of books, newspapers, or periodicals, as of other persons.⁴

The truth of effigy, picture, or sign, so far as such may relate to the physical person of the party intended, and not to his character, is (probably) no justification of a malicious publication. A man is not responsible for his physical peculiarities, and may well invoke the protection of the courts against one who will maliciously parade them before the public.

§ 10. OF MALICE AND PRIVILEGED COMMUNICATIONS.

To constitute slander or libel, malice is deemed necessary; but malice in this connection is of two kinds, malice in law and malice in fact. The first is presumptive; the second is actual. Malice is, indeed, presumed in all cases of legal slander or libel; but the presumption may generally be rebutted, and then the plaintiff can recover only upon proof of actual malice. The effect of the presumption

¹ *Baum v. Clause*, 5 Hill, 199.

² *Campbell v. Spottiswoode*, 3 Best & S. 769; *Smart v. Blanchard*, 42 N. H. 137; *Odgers, Slander*, 169.

³ *Smith v. Stewart*, 5 Barr, 372; *Odgers, Slander*, 302, 589.

⁴ *Smart v. Blanchard*, *supra*; *Campbell v. Spottiswoode*, *supra*.

may be thus stated: The publication of defamation is presumed, *prima facie*, to have been done of malice, and justifies a verdict for the person defamed without further proof. [For example: The defendant goes to the plaintiff's relatives and falsely charges him with theft. This is sufficient to justify a verdict for the plaintiff: he need not offer other evidence to establish malice. Hence, too, the defendant cannot deny that the plaintiff's case, as here stated, shows that the charge was made maliciously, whatever was the fact.]

It follows that, if the defamation were not published upon a justifiable occasion, the defendant will not be allowed to deny the inference of malice which the law draws therefrom. He will not be permitted to say that he was not actuated by malice unless the *occasion* on which the publication was made indicates an absence of malice. The defendant must find his justification in the circumstances of the publication.

There are then occasions or circumstances in which the publication of what would otherwise be actionable defamation is excused. The publication of the charge or representation in such cases is in legal language said to be privileged; the charge or representation itself being termed a privileged communication.

Privileged communications are of two kinds; absolutely privileged and *prima facie* privileged communications.² A communication is absolutely privileged when the fact that it was published with actual, provable malice, that is, malice in fact, is immaterial, not affecting the excuse. In

¹ Hooper v. Truscott, 2 Bing. N. C. 457; s. c. 2 Scott, 672.

² Hastings v. Lusk, 22 Wend. 410; s. c. Bigelow's L. C. Torts, 121; Sheller v. Gooding, 2 Jones, 175. The Supreme Court of the United States have, *obiter*, denied the existence of absolutely privileged communications. White v. Nicholls, 3 How. 266. But the weight of authority is *contra*.

other words, a communication is absolutely privileged when evidence that it was published with actual malice is not admissible. A communication is *prima facie* privileged when evidence on the part of the plaintiff is admissible to show that the communication was published with actual malice. In the former case, the defence (if true) is a perfect one, and cannot be disturbed: in the latter case, it is perfect, provided evidence of malice be not offered by the plaintiff.

Under the head of absolutely privileged communications, there are several classes of cases. Among them one of the first in importance is the case of remarks by counsel in the argument of a cause before a judicial tribunal. But the privilege of an attorney to utter defamation of another in the argument of his client's cause is not unlimited. The defamation must have been uttered under circumstances in which it was relevant and pertinent to the issue before the court. If it was relevant and pertinent, it matters not how false or malicious was the publication; the attorney is not liable. If it was not relevant and pertinent, no protection is afforded the attorney. An attorney is not allowed, in the course of an argument, to turn aside from the proper object of consideration and spread defamation. [For example: The defendant, in the argument of his own cause, charges the plaintiff with perjury, the charge not being relevant to the issue before the court. The charge is not privileged.]

It is probable also that the language complained of must have been uttered in the course of actual argument in court, and that otherwise, however relevant and pertinent to the cause on trial it may be, the publication is not privileged.²

The same absolute protection, under probably similar restrictions, is extended to the allegations contained in the

¹ *Hastings v. Lusk*, 22 Wend. 410; s. c. *Bigelow's L. C. Torts*, 121.

² *Ib.*

written pleadings of causes.¹ So, likewise, of affidavits made in the course of a trial,² even though the persons making them be not parties to the cause;³ and so of the statements of a witness on the stand,⁴ and of the judge sitting in the hearing of the cause,⁵ or of a coroner holding an inquest,⁶ and finally of words uttered in the proper discharge of official duty.⁷

A juror is under absolute protection for any thing he may say during the deliberations of the jury concerning their verdict, whether his language be pertinent to the cause or not, if he acted honestly, in the belief that he was properly discharging his duty as a juror. For example: The defendant, during the deliberations of a jury of which he is a member, held in the jury room, concerning their verdict in a suit brought by the present plaintiff, says he would not believe the plaintiff under oath, and accuses him of having obtained an insurance of property by fraud, and afterwards of committing perjury in a suit for the insurance money. That trial has no connection with the case before the jury, but the defendant acts honestly, believing himself to be in the discharge of his duty. The defendant violates no legal duty to the plaintiff.⁸

The law upon this subject has been thus (in substance) summarized: No action either for slander or libel can be maintained against a judge, magistrate, or person sitting in a judicial capacity over any court, judicial or military,⁹

¹ *Henderson v. Broomhead*, 4 Hurl. & N. 577.

² *Garr v. Selden*, 4 Comst. 91.

³ *Henderson v. Broomhead*, *supra*.

⁴ *Reevis v. Smith*, 18 Com. B. 126.

⁵ *Scott v. Stansfield*, Law R. 3 Ex. 220.

⁶ *Thomas v. Churton*, 2 Best & S. 475.

⁷ *Goodenow v. Tappan*, 1 Ohio, 60; *Dunham v. Powers*, 42 Vt. 1.

⁸ *Dunham v. Powers*, *supra*.

⁹ *Jekyll v. Moore*, 2 Bos. & P. N. R. 341.

recognized by and constituted according to law; nor against suitors, prosecutors, witnesses, counsel, or jurors, for any thing said or done relative to the matter in hand, in the ordinary course of a judicial proceeding, investigation, or inquiry, civil or criminal, by or before any such tribunal, however false or malicious it may be.¹

The rule of law by which defamatory statements made in the course of proceedings in the judicial tribunals are privileged governs all statements and publications made in the course of the proceedings of the Legislature. The occasion is deemed to afford an absolute justification for the use of the defamation, so long as it relates to the proceedings under consideration. No member of either house of Congress, or of a State Legislature, is liable in a court of justice for any thing said in that house, however offensive the same may be to the feelings or injurious to the reputation of another.²

This privilege, however, is absolute only within the walls of the house, or (probably) of such other places as committees of the Legislature are authorized to occupy. It is not personal, but local. A member who publishes slander or libel outside of such locality stands on the same footing with a private individual. [For example: A member of the Legislature prints a speech delivered by him in the House, containing defamatory language of the plaintiff. This at common law is a breach of duty.³]

The same protection is extended to persons presenting petitions to the Legislature, and with the same restriction. The printing and exhibiting a false and defamatory petition to a committee of the Legislature, and the delivery of

¹ Starkie, *Slander and Libel*, 184 (4th Eng. ed. by Folkard), slightly varied.

² See *Rex v. Abingdon*, 1 Esp. 226, an indictment for libel.

³ See *Rex v. Abingdon*, *supra*; *Rex v. Creevy*, 1 Maule & S. 273, *Stockdale v. Hansard*, 9 Ad. & E. 1.

copies thereof to each member of the committee, is justifiable, unless perhaps the petition is a mere sham, fraudulently put forth for the purpose of defaming an individual. But a publication to any others than the members of the committee, or at any rate to others than members of the Legislature, removes the protection, and renders the author liable.¹

The occasions above presented are the only ones in which the publication of defamation is absolutely justified. The occasions which afford a *prima facie* protection to defamatory publications must now be considered.

The class of cases of defamatory communications which fall under this head is both extensive and often complicated. It will be convenient to divide it into two branches; to wit, communications pertaining to matters of a public nature, and communications pertaining to matters of a private nature.

Proceedings before church organizations for the discipline of members thereof are *quasi* judicial, and afford protection, *prima facie* in kind, for the utterance of defamatory language, if it have any pertinency to the matter under consideration. [For example: The defendant, while on trial before a church committee for alleged falsehood and dishonesty in business, says of the plaintiff, "I discharged him for being dishonest, — for stealing. That is the cause of this trouble." The defendant is not liable in the absence of evidence that he was actuated by express malice.²]

Literary criticism stands upon a like footing. However severe it may be, however unjust in the opinion of men capable of judging, so long as the critic confines himself

¹ See *Lake v. King*, 1 Saund. 181 b, where this is conceded; *Hare v. Miller*, 3 Leon. 138, 163.

² *York v. Pease*, 2 Gray, 282; *Farnsworth v. Storrs*, 5 Cush. 412.

to honest criticism of another's writings, the act cannot be treated as a breach of legal duty, at least for the purposes of an action for defamation. But if the critic turn aside from the proper purpose of criticism and hold up the author's person or character to ridicule, he loses his protection, and becomes liable in an action for libel.¹

The criticism of works of art, whether painting, sculpture, monument, or architecture, is (probably) similarly privileged. [For example: The defendant says of a picture of the plaintiff, placed on exhibition, "It is a mere daub." The defendant, at least if honest in his criticism, cannot be held liable to an action for defamation, however unjust the criticism.²]

Reports of trials before the judicial tribunals, if sufficiently full to give a correct and adequate impression of the proceedings, and if not attended with defamatory comments, are *prima facie* privileged. If, however, the same should be malicious, partial, or followed by comments containing defamatory matter, the privilege would fail, and the publisher, editor, and author would be liable for any defamation thereby spread. [For example: The defendant prints a short summary of the facts of a certain case in which the plaintiff has acted as attorney. The account of the trial states that the then defendant's counsel was extremely severe and amusing at the expense of the present plaintiff. It then sets out parts of the speech of the defendant's counsel which contain some severe reflections on the conduct of the plaintiff in the trial of that action. The defendant is liable.³]

An abridged report of a trial in one of the superior

¹ Carr v. Hood, 1 Campb. 355, note; Odgers, Slander, 39.

² Thompson v. Shakell, 1 Moody & M. 187. See Gott v. Pulsifer, 122 Mass. 235; Odgers, Slander, 39, note.

³ Flint v. Pike, 4 Barn. & C. 473.

courts may, however, be privileged (probably) if it be fair, so as to convey a just impression of what took place, and be free from objectionable comments.¹

The objection to defamatory comments applies equally well when they are put into the form of a heading to the report. [For example: The defendant prints an account of a trial in which the plaintiff was involved, heading the same "Shameful conduct of an attorney," the attorney referred to being the present plaintiff. The publication is not privileged.²]

The editor or writer may, however, use a heading properly indicative of the nature of the trial, if it do not amount to comment. That is, the subject of the trial may be stated. [For example: The defendant prints a report of a trial under the heading "Wilful and corrupt perjury." But this is only a statement of the charge made against the plaintiff at the trial. There is no breach of duty to the plaintiff.³]

The publication of *ex parte* proceedings before the inferior courts is not, in this country, privileged.⁴ The privilege stops with the right of reporting the transactions of the judicial tribunals concerning parties on regular trial in the ordinary course of justice. Nor is any privilege (at common law) conferred upon the proprietors, editors, or publishers of the public prints for the publication of defamatory matter uttered in the course of public meetings though held under authority of law for public purposes. [For example: The defendant prints an account of a public meeting of commissioners of a town, the body acting under powers granted by statute; and the report is a fair and truthful

¹ *Turner v. Sullivan*, 6 Law T. n. s. (Eng.) 130, at *nisi prius*.

² *Lewis v. Clement*, 3 Barn. & Ald. 702.

³ *Lewis v. Levy*, El. B. & E. 537.

⁴ *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548; *Matthews v. Beach*, 5 Sandf. 256.

statement of what occurred at the meeting. It, however, contains defamatory language uttered concerning the plaintiff at the meeting. The defendant is liable.^{1]}

It does not affect the case that the publication relates to a matter of great interest to the public, even though the public be at a point of unusual anxiety on the subject. [For example: The defendant charges the plaintiff in a newspaper with treachery and bad faith in regard to money received by him to obtain the manumission of a fugitive slave in whom there was great interest in the community. The publication is not privileged.^{2]}

The right to publish the proceedings of the courts of justice is based upon a supposed general utility to the public. It is more obviously to the advantage of the public that true accounts of the proceedings of the Legislature should be placed before the people. Upon this principle, therefore, the publication of the proceedings of the Legislature is privileged, though they contain defamatory matter; though the privilege, as in the other cases mentioned, will not cover malicious publications. Without evidence of malice the protection is complete. [For example: The defendant publishes a true report of a debate in the Legislature, upon a petition presented by the plaintiff for the impeachment of a judge. Defamatory statements against the plaintiff are made in the course of the debate, and these are published with the report. The defendant is not liable in the absence of malice.^{3]}

Communications made to the proper public authorities, upon occasions of seeking redress for wrongs suffered or threatened, in which the public are concerned, or in which

¹ *Davison v. Duncan*, 7 El. & B. 229.

² *Sheckell v. Jackson*, 10 Cush. 25.

³ *Wason v. Walter*, Law R. 4 Q. B. 73. The protection in this case was extended also to comments made in an honest and fair spirit.

the party making or receiving the communication is alone concerned, are presumed, *prima facie*, to have been made in good faith and without malice, unless the form of the communication itself show the contrary. [For example: the defendant charges the plaintiff with being a thief, the charge being made before a constable acting as such, after the defendant had sent for him to take the plaintiff into custody. The defendant is not liable in the absence of evidence of actual malice.¹]

Upon the same principle, statements made by a taxpayer and voter at a town meeting, held to consider an application from the assessors of the town for the use of money for a particular purpose, may be privileged so far as they bear upon the matter before the meeting, though they be defamatory. [For example: The defendant, at a town meeting held on application of the town assessors to consider the propriety of reimbursing the assessors for expenses incurred in defending a suit for acts done in their official capacity, falsely charges the assessors with perjury in the suit. Being a taxpayer and voter, he is not liable to any of the persons defamed, unless shown to have been actuated by malicious motives.²]

A similar protection is extended to persons acting under the management of bodies instituted by law, and having a special function of care in respect of the interests of the public. While acting within the limits of their function, they are *prima facie* exempt from liability for defamatory publications made. [For example: The defendants, trustees of a College of Pharmacy, — an institution incorporated for the purpose, among other things, of cultivating and improving pharmacy, and of making known the best methods of preparing medicines, with a view to the public

¹ Robinson v. May, 2 Smith (Eng.), 8.

² Smith v. Higgins, 16 Gray, 251.

welfare, — make a report to the proper officer concerning the importation of impure and adulterated drugs, falsely charging the plaintiff with having made such importations; the report being made after investigation caused by complaints made to the defendants of the importation of such drugs. The defendants are not liable unless they acted with express malice towards the plaintiff.¹

The conduct of public officers amenable to the public only, and of candidates for public office, is a matter proper for public discussion. According to English authority, it may be made the subject of hostile criticism and animadversion, so long as the writer keeps within the bounds of an honest intention to discharge a duty to the public, and does not make the occasion a mere cover for promulgating malicious and false allegations. The question in such cases therefore is, whether the author of the statements complained of has transgressed the bounds within which comments upon the character or conduct of a public man should be confined; — whether, instead of a fair, reasonable, and honest comment upon the subject, the occasion was made an opportunity for gratifying personal vindictiveness and hostility.² It follows that when the public conduct of a public man is open to animadversion, and a person in commenting upon it makes imputations on his motives which arise fairly out of his conduct, he is, *prima facie*, protected from an action at law, though the imputations be false.³ But this view has not widely obtained in the United States; the contrary being generally laid down, that no privilege exists to attack the character of a public officer or of a candidate for a public office. To justify an attack of the kind the charges must be shown to be

¹ Van Wyck v. Aspinwall, 17 N. Y. 190.

² Campbell v. Spottiswoode, 3 Best & S. 776.

³ See Campbell v. Spottiswoode, *supra*.

true.¹ The English rule, however, appears to prevail in some States.²

If, however, the officer, or the office sought, be not subject to direct control by the public, — if the same be subordinate to the authority of an officer having a power of removal over the incumbent, — then (probably) there exists no right to animadvert upon the conduct of such subordinate officer or candidate through public channels. The proper course to pursue in case of supposed incapacity or unfitness of the party for the position would be to state the facts to the superior officer alone, and call upon him to act accordingly.

The use of the public prints is sometimes justifiable to protect a person against the frauds or depredations of a private citizen; and when this is the only effectual mode of protection, persons are *prima facie* protected in adopting it even against innocent men. For example: The defendant, a baker, employing servants in delivering bread in various towns, inserts in a newspaper published in one of the towns a card, stating that the plaintiff “having left my employ, and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business.” The communication is privileged in the absence of evidence of actual malice.³

Statements made to the public in vindication of character publicly attacked are privileged if *bona fide*, and free from malice, at least if made through proper channels. For example: The defendant publishes a newspaper arti-

¹ *Hamilton v. Eno*, 81 N. Y. 116; *Root v. King*, 7 Cowen, 613; s. c. 4 Wend. 113; *Sweeney v. Baker*, 13 W. Va. 158; *Curtis v. Mussey*, 6 Gray, 261. See *Bailey v. Kalamazoo Pub. Co.* 40 Mich. 251.

² *Mott v. Dawson*, 46 Iowa, 533; *Palmer v. Concord*, 48 N. H. 211. See *Odgers, Slander*, 40, note.

³ *Hatch v. Lane*, 105 Mass. 394.

cle containing reflections upon the plaintiff's character, in reply to an article by the plaintiff assailing the defendant's character. The defendant acts honestly, in defence of himself. The communication is *prima facie* privileged.¹

The like rule of law prevails when the first attack is delivered privately, and not spread before the public. The party assailed may reply in the same manner, and will be protected if not actuated by dishonest or malicious motives, though his reply impute defamation to the other party. And such reply may be made by the party's agent as well as by himself. For example: The defendant, an attorney, writes and publishes a letter in vindication of the character of one of his clients, in reply to certain charges of conspiracy preferred and published against the latter. The defendant's letter contains defamatory charges against the plaintiff, among them one of perjury. The defendant is not liable if he wrote the letter in honest vindication of his client's character, and without actual malice, using terms warranted under the circumstances in which he wrote.²

It remains to consider the case of *prima facie* privileged communications concerning matters of a purely private nature. And here at the outset a general distinction in law must be observed, which separates the class of cases now to be noticed from those above considered, or at least from all except the cases relating to communications in vindication of character. With the exception of this last class of cases, all of the foregoing phases of privileged communications show that the defendant may justify (in a case otherwise proper for the defence) though his communication was made voluntarily, that is, without request from another having an interest therein. Indeed, communications in defence of character are made, or may be

¹ O'Donoghue v. Hussey, Irish R. 5 C. L. 124.

² Rex v. Velej, 4 Fost. & F. 1117.

made, without actual request; but the first attack, especially when publicly made, may properly be considered a challenge to reply. It is therefore equivalent to a request, and the reply cannot be considered as voluntarily made. In regard to the other cases above presented, the communication is necessarily voluntary in most cases; and a voluntary publication is justified on the ground that greater evils would be apt to befall society if such publication were to be declared unlawful than are likely to follow by permitting it.

When, however, the communication relates to a matter of private interest, the case will usually be different. Generally speaking, it will not be justifiable in law for a party to communicate to another, without request, that which turns out to be unfounded and defamatory of a third person. The exceptions to this proposition arise either (1) from the circumstance that the situation of the party publishing the defamation towards the party of whom it is published is such as to render it highly improbable that the former was actuated by malicious motives towards the latter, when the communication was made to a party having an interest in it; or (2) from the circumstance that the parties sustain a relation of close confidence to each other, either of very near relationship (by blood or marriage) or of pecuniary connection.

Under the first of these two heads, is to be mentioned the case of communications made by a master (or late master) concerning the conduct of his servant, made to a neighbor or friend about to take the servant into his employ. The master violates no duty of law to his servant in such a case by making honest statements to his neighbor in derogation of the servant's character, in an unofficial manner, and with an honest purpose to protect his neighbor. For example: The defendant having discharged his

servant the plaintiff, for supposed misconduct, and hearing that he was about to be engaged by a neighbor, writes him a letter, informing his neighbor that he has discharged the plaintiff for dishonesty, and that he cannot recommend him; the charge of dishonesty being false, but believed by the defendant to be true. The defendant's act is *prima facie* justifiable; the circumstances not indicating any officiousness or undue zeal on his part.¹

It should be noticed that it devolves upon the defendant to show, not only the existence (at the time or before) of the relation between the parties, but also that he acted in good faith, believing that his communication was true.² And this statement applies throughout the law of *prima facie* privilege.

It has already been observed that the defendant's belief in the truth of the charge (and it might be added his honesty and sincerity in making it) is no defence in cases not of privileged communications.³

The result then is, that in cases arising under the first head (such as cases between master and servant), the fact that the communication has been voluntarily made does not necessarily prevent the charge from being *prima facie* privileged. Its effect at most is only to require the defendant to give strong evidence that he acted honestly and in good faith.⁴ But of course the plaintiff is at liberty to overturn this evidence if he can, by showing that the defendant was in fact actuated by malicious motives in making the charge, as that he did not believe the charge true.

Under the second of the heads stated, where there exists a very near relationship, or a pecuniary connection of con-

¹ See *Pattison v. Jones*, 8 Barn. & C. 578, 584, Bayley, J.

² *Pattison v. Jones*, 8 Barn. & C. 578; *Dawkins v. Paulet*, Law R. 5 Q. B. 102; *Odgers, Slander*, 199.

³ *Ante*, p. 51.

⁴ See *Pattison v. Jones, supra*, Littledale, J.

fidence, between the parties, may be mentioned the case of a parent admonishing his daughter against the attentions of a particular person, who is falsely charged with the commission of a crime; or of a partner advising his copartner to have no partnership dealing with another on the false ground that he is a swindler and thief. It is certainly safe, *prima facie*, to volunteer the statement of a false accusation in such cases, at all events if there be evidence that the defendant acted honestly and in good faith.

A confidential relation by pecuniary connection is, however, for the purposes of this protection, much wider than might be supposed from the case of partners last mentioned. A confidential relation, within the scope of the protection to voluntary communications (probably), arises wherever a continuous trust is reposed in the skill or integrity of another, or the property or pecuniary interest, in whole or in part, or the bodily custody, of one person, is placed in charge of another.¹ Besides the cases above stated, this definition will cover communications made by an attorney to his client concerning third persons with whom the client is, or is about to be, engaged in business transactions;² communications made to an auctioneer of property concerning the sale by persons interested in the property;³ communications of landlords to their tenants imputing immoral conduct to some of the inmates of the premises;⁴ and many other cases of a like nature.

Voluntary communications in all of these cases are justifiable on the ground that the party receiving them has a right to expect them; and, wherever a right to expect the

¹ Bigelow, *Fraud*, 190.

² See *Davis v. Reeves*, 5 Irish C. L. 79.

³ *Blackham v. Pugh*, 2 Com. B. 611.

⁴ *Knight v. Gibbs*, 3 Nev. & M. 469.

communication may reasonably be supposed to exist, the communication will be protected, unless it was prompted by malicious motives. For example : The defendant, attorney of another, writes to the latter that the plaintiff, the client's debtor, is about to abscond for the purpose of defrauding his creditors, the charge being false. The defendant, *prima facie*, is not liable.¹

Another case has already been mentioned in which voluntary communications concerning matters of a private nature are deemed justifiable ; to wit, where this is the only adequate mode of protecting a person from the (supposed) frauds or depredations of another.² Perhaps, however, this case would be covered by the proposition of the paragraph preceding.

In all other cases, communications voluntarily made, and containing defamation, are actionable *per se*. For example : The defendant meets a third person in the street, who is a mere acquaintance, and falsely states to him, without inquiry, that the plaintiff's bank has failed. The defendant is guilty of a breach of legal duty to the plaintiff.³

On the other hand, it is a general rule of law that communications *bona fide* made, in answer to proper inquiries, are privileged. But a communication is not necessarily privileged because of being made upon request. If it should be unnecessarily, or perhaps unnaturally, defamatory under the circumstances, the privilege would be lost. Such fact would, indeed, show that the writer or speaker was actuated by express malice, and would thus destroy the protection which was actually available to the party, and restore to the plaintiff his right of redress.⁴

¹ Davis v. Reeves, 5 Irish C. L. 79.

² Hatch v. Lane, 105 Mass. 394 ; *ante*, p. 62.

³ See Bromage v. Prosser, 4 Barn. & C. 247 ; s. c. Bigelow's L. C. Torts, 131.

⁴ Fryer v. Kinnersley, 15 Com. B. N. s. 422.

Again, a communication made upon request is not protected unless the request come from a proper person, or at least from one whom the defendant has reason to suppose a proper person. If the defendant know, or have good reason to know, that the party making the inquiry has no interest in the matter in question other than that of curiosity, the defendant (probably) is not justified in making the communication. Even the near relatives of a person interested in the subject of the communication cannot by request afford protection to every one to publish defamation of another. For example: The defendant, formerly but not at present pastor of a lady, writes a letter to the lady, on request of her parents, warning her against receiving attention from a certain person, the letter containing false and defamatory accusations against him. The communication is not privileged.¹

This subject of privileged communications may be summarized by the following proposition, subject, however, to such explanation as the foregoing presentation suggests: A communication believed to be true, and made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter, which, without such privilege, would be actionable.²

It follows from this, that no privilege is afforded the mere repetition of defamation; and this is true by the

¹ *Joannes v. Bennett*, 5 Allen, 169. Perhaps the communication would have been privileged had it come from the lady's present pastor; and it clearly would have been protected had it been written on request of the lady herself.

² *Harrison v. Bush*, 5 El. & B. 344; *Gassett v. Gilbert*, 6 Gray, 94; *Joannes v. Bennett*, 5 Allen, 169.

weight of authority, though the party repeating it give the name of the person from whom he received it. The repetition of the language is generally deemed actionable to the same extent, and doubtless with the same qualifications, as is the original publication.¹ For example: The defendant says to a third person concerning the plaintiff, "You have heard of the rumor of his failure," — merely repeating a current rumor that had come to his ears that the plaintiff had failed. The defendant is liable, if there was no such relation between him and the party to whom he made the communication as would cause the latter to expect a communication on such matters.²

It must be understood that the law of slander and libel applies only to defamation *in pais*; that is, to defamatory charges not prosecuted in a court of justice. If the defamation consist of an accusation prosecuted in court, the accused must seek his redress by an action for a malicious prosecution; in regard to which the right to recover depends upon quite different rules of law. To this subject attention will now be directed.

¹ *De Crespigny v. Wellesley*, 5 Bing. 392; s. c. *Bigelow's L. C. Torts*, 151; *Stevens v. Hartwell*, 11 Met. 542; *Sans v. Joerris*, 14 Wis. 663; *Inman v. Foster*, 8 Wend. 602. *Contra*, *Haynes v. Leland*, 29 Maine, 233. See also *Jarnigan v. Fleming*, 43 Miss. 710; *Odgers, Slander*, 162.

² *Watkin v. Hall*, Law R. 3 Q. B. 396.

CHAPTER III.

MALICIOUS PROSECUTION.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty to forbear to institute against him a prosecution, with malice and without reasonable ground, for an offence falsely charged to have been committed by B.

OBSERVATIONS.

1. When a termination of prosecution is referred to without further explanation, such a termination is meant as will, in connection with the other elements of the action, permit an action for malicious prosecution.

2. Whenever an arrest is spoken of, an arrest for crime is meant unless the term is used in connection with a civil action.

In order to maintain an action for a malicious prosecution, three things are deemed necessary, and sometimes four, to wit (1), the prosecution complained of must have terminated before the action for redress on account of it is commenced; (2) the prosecution must have been instituted without reasonable or probable cause (ground); (3) it must have been instituted maliciously; (4) when the charge prosecuted would not have been actionable *per se*, had it been published merely *in pais*, actual damage must have been sustained by the plaintiff. And it devolves upon the plaintiff to prove all of these facts.

Actions of this kind are brought for malicious criminal prosecutions more commonly than for the like civil prose-

cutions. An action may be maintained, however, for the malicious prosecution of a civil demand, — at least, in many cases. It is clear that if there was an arrest under the civil process, the case comes within the limits of the law concerning malicious prosecutions; and it is no less clear that this branch of law covers cases in which there was no arrest. The unsuccessful prosecution of utterly unfounded claims, for the mere purpose of harassing another, would (probably) afford ground for an action for malicious prosecution. For example: The defendant forges a promissory note, payable to himself, signing the plaintiff's name to it. He brings suit upon it, and failing by reason of the proof of the forgery, he is sued by the now plaintiff for a malicious prosecution. The defendant is (probably) liable.¹ Again: The defendant maliciously and without reasonable ground replevies the plaintiff's goods. Upon the termination of the replevin suit in favor of the now plaintiff, he brings an action for malicious prosecution. The defendant is liable.²

It appears to be clear that the action is maintainable whenever the prosecution, whether criminal or civil, was totally unfounded to the knowledge of the party who instituted it, and the suit for redress is brought after the termination of the prosecution in favor of the then defendant. In regard to actions for civil suits, however, the want of probable cause must be very palpable. Very slight grounds of claim will justify an action.³

¹ No specific authority can be given for this example, but its correctness may be inferred from the language of the courts in *Wren v. Weild*, Law R. 4 Q. B. 730, 734, and *Green v. Button*, 2 Crompt. M. & R. 707, though the malicious act in those cases did not consist in bringing suit. See also *Bicknell v. Dorion*, 16 Pick. 478.

² See *O'Brien v. Barry*, 106 Mass. 300. The plaintiff failed in this case, but the reason was that he had sued before the termination of the action of replevin.

³ See *Wren v. Weild*, *supra*; also *post*, p. 78.

§ 2. OF THE TERMINATION OF THE PROSECUTION.

The action for a malicious prosecution is given for the preferring in court of a *false* charge, maliciously and without proper grounds.¹ And, as it cannot be known by the most satisfactory evidence concerning the charge whether it be true or false before the verdict and judgment of the court trying the cause, it is deemed to be necessary for the defendant to await the termination of the proceeding before instituting an action for malicious prosecution. Or, as the reason has more commonly been stated, if the suit for the alleged malicious prosecution should be permitted before the prosecution itself is terminated, inconsistent judgments might be rendered, — a judgment in favor of the plaintiff in the action for the prosecution and a judgment against him in that prosecution; and judgment against the party prosecuted would, it is deemed, show that the prosecutor had reasonable ground for his conduct.² The judgment would therefore show that the prosecutor had violated no duty to the other party.

It follows directly, in accordance with this explanation of the rule that the prosecution must have terminated before the action on account of it is instituted, that the prosecution must have terminated with judgment in favor of the party prosecuted, or with a state of things tantamount to such a judgment. And this is true even though the prosecution take place in a proceeding from which there is no appeal. Conviction in such a case is equally

¹ An action may be maintained in certain cases for the *manner* of prosecuting a true charge; but the action in such cases is not for the *prosecution*, and the rules governing it are not the rules governing an action for a malicious prosecution. See Ch. 6.

² *Fisher v. Bristow*, 1 Doug. 215; *Parker v. Huntington*, 7 Gray, 37. See also *Cardinal v. Smith*, 109 Mass. 158; *O'Brien v. Barry*, 106 Mass. 300; *Besébé v. Matthews*, Law R. 2 C. P. 684.

fatal with a conviction in a tribunal from the judgment of which the defendant has a right of appeal; since to allow the action for malicious prosecution would be (so it is deemed) virtually to grant an appeal, — a thing contrary to law in the particular case. For example: The defendant procures the plaintiff to be arrested (falsely, maliciously, and without probable cause, as the latter alleges) and tried before a justice of the peace on a criminal complaint of assault and battery. The plaintiff (then defendant) is convicted, and no appeal is allowed by law. The defendant is not liable for malicious prosecution.¹

The explanation given, and the deduction from it that the prosecution must have terminated with an acquittal of the then defendant, are not in fact fully carried out. An acquittal, or action tantamount to an acquittal, is a bar to a second prosecution for the same offence. But there are several classes of cases in regard to which it is not necessary that the proceedings in the prosecution complained of should have gone so far as to operate as a bar to a new prosecution for the same offence. Indeed, it will presently be seen that the explanation and deduction are applied only to civil cases in which judgment has actually been pronounced and to indictments prosecuted to trial before the petit jury.

It is not necessary to the termination of a civil suit, such as will permit an action for malicious prosecution, that the suit should have gone to actual judgment, or even to a verdict by the jury. A civil suit is entirely within the control of the plaintiff, and he may withdraw and terminate it at any stage; and, should he take such a step, the suit is terminated. For example: The defendant (in the suit for malicious prosecution) writes in the docket book, opposite the entry of the case against the plaintiff,

¹ *Besébé v. Matthews*, Law R. 2 C. P. 684.

“Suit withdrawn.” This is a sufficient termination of the cause for the purposes of the now plaintiff.¹

It is not necessary, indeed, that the party should make a formal entry of the withdrawal or dismissal of the suit, in order (without a judgment or verdict) to terminate it sufficiently for the purposes of an action by the opposite party. Any act, or omission to act, which is tantamount to a discontinuance of the proceeding has the same effect. For example: The defendant, having procured the arrest of the plaintiff, fails to have the writ returned into court, and fails to appear and file a declaration at the return term. The plaintiff may treat the suit as terminated.²

If, however, the (civil) prosecution went to judgment, the judgment must have been rendered in favor of the defendant therein, in order to enable him to sue for malicious prosecution. Judgment against the defendant would conclusively establish the plaintiff’s right of action: it could not, therefore, be treated as a false prosecution,³ though it might have been attended with malice; unless, indeed, it was concocted in fraud.

If the prosecution was criminal, the situation is different. Such a proceeding is instituted by the State, and, when by indictment, is under the control of the attorney-general, or other prosecuting officer: it is never under the control of the prosecutor. He has no authority over it; and, this being the case, he cannot be bound by the action of the prosecuting officer. Should such officer, therefore, enter a dismissal of the suit before the defendant has been put in jeopardy, this act gives no right to the prisoner against the prosecutor. The course of proceed-

¹ *Arundell v. White*, 14 East, 216.

² *Cardinal v. Smith*, 109 Mass. 158.

³ Or, as the case is sometimes put, judgment for the plaintiff would show that he had probable cause for the prosecution, a point to be considered hereafter.

ing was not arrested by the prosecutor, and he has a right to insist that the law shall take its regular course, and place the prisoner in jeopardy, before he shall have the power to seek redress. For example: The defendant procures the plaintiff to be indicted for arson. The prosecuting officer, failing in obtaining evidence, enters a *nolle prosequi* before the jury is sworn. The prosecution is not terminated in favor of the prisoner.¹

If the prosecution was arrested by the grand jury's finding no indictment upon the evidence before them, and the consequent discharge of the prisoner, this is an end of the prosecution, such as will enable him (other elements present) to bring the action under consideration.² And the same is true when the prosecution is begun by complaint before a magistrate who has jurisdiction only to bind over or discharge the prisoner. The magistrate's entry that the prisoner is discharged entitles him, other elements being present, to bring an action. And this is true, though the prosecutor withdraw his prosecution. For example: The defendant prefers against the plaintiff a charge of forgery before a justice of the peace, who has authority only to bind over or discharge the prisoner. The justice's minutes contain the following entry: "After full hearing in the case, the complainant withdrew his prosecution, and it was thereupon ordered" that the plaintiff be discharged. An action for malicious prosecution is now proper.³

The rule, it will be noticed, is not altogether consistent in these cases, and hence no criterion can be laid down which shall be applicable to all. It is clear, however, that after the prisoner has been put in jeopardy, in the legal sense, a dismissal of the suit and discharge of the defend-

¹ Bacon v. Towne, 4 Cush. 217.

² Cardinal v. Smith, 109 Mass. 158.

³ Sayles v. Briggs, 4 Met. 421.

ant will (so far as the rule concerning the termination of the prosecution is concerned) give him a right of action. A dismissal at such a stage is a virtual acquittal, since a person cannot be put twice in jeopardy for the same offence. But a state of jeopardy is not reached until the swearing of the petit jury; and, according to some of the authorities, not until after their verdict.¹ Hence if this were the test, an action for malicious prosecution could not be instituted upon the failure of the grand jury to find an indictment, or upon the discharge of a magistrate who has no power to convict. In neither case has the prisoner been in jeopardy. The fact appears to be that, notwithstanding the language of the judges, a termination of the (criminal) proceedings with an acquittal (actual or virtual) is necessary only in case an indictment has been found against the prisoner. In other cases, it is only necessary that the prosecution of the prisoner should be dismissed. And though this be not done by request of the prosecutor, he may be liable.²

¹ See 1 Bishop, Criminal Law, § 1018 (6th ed.).

² *Witham v. Gowan*, 14 Maine, 362. The rule requiring an acquittal of the party prosecuted is founded upon an early English statute entitled "Malicious Appeals." Westm. 2, c. 12 (13 Edw. 1). By this statute it was ordained that when any person maliciously "appealed [that is, accused and prosecuted] of felony surmised upon him, doth *acquit* himself in the King's Court in due manner," &c., the appellor shall be imprisoned and be liable in damages to the injured party. Had this statute been always referred to in the modern authorities, the explanation of the subject would have been satisfactory. The statute applies to cases of prosecutions for felony alone; and in such cases only is an acquittal necessary. All other cases stand, so far as this statute affects the law, as at common law. Prosecutions for misdemeanors, prosecutions before inferior courts, and civil prosecutions, are left to be governed by the dictates of reason and political economy. The statute has not been materially departed from; but its existence appears to have been overlooked in modern times, and the consequence is seen in the unfortunate explanations of the law given by the courts and above stated.

By way of summary, the various rules of law may be thus stated: A civil suit is terminated (1) when the plaintiff has withdrawn, or otherwise discontinued, his action; or (2) when judgment has been rendered in favor of the defendant. A criminal suit is terminated (1) when the prosecution, if brought before a magistrate, has been dismissed, or (2) when, if preferred before the grand jury, that body has found no indictment; or (3) when, an indictment having been found, and the prisoner having been put in jeopardy, the prosecution has been dismissed; or (4) when a verdict of the jury acquitting the prisoner has been rendered. Perhaps the prisoner should also have been discharged; but he is entitled to a discharge in all these cases.

§ 3. OF THE WANT OF PROBABLE CAUSE.

Supposing the plaintiff to have begun his action after the termination of the prosecution, it then devolves upon him further to establish the defendant's breach of duty by showing that he instituted the prosecution without reasonable grounds.¹ And this, when applied to criminal cases, means that he ought to show that no such state of facts or circumstances was known as would induce men of ordinary intelligence and caution to believe the charge preferred to be true.² Or, conversely, probable cause for preferring a charge of crime is deemed to be a reasonable ground of suspicion, supported by circumstances sufficiently strong of themselves to warrant a cautious man in believing the accused to be guilty.³

To act, therefore, on very slight circumstances of suspicion, such as a man of caution would deem of little weight, is to act without probable cause. For example:

¹ *Turner v. Ambler*, 10 Q. B. 252.

² *Driggs v. Burton*, 44 Vt. 124.

³ *Boyd v. Cross*, 35 Md. 194.

The defendant procures the arrest of the plaintiff upon a charge of being implicated in the commission of a robbery, which in fact has been committed by a third person alone, who absconds. The plaintiff, who has been a fellow-workman with the criminal, has been heard to say that he (the plaintiff) had been told, a few hours before the robbery, that the robber had absconded, and that he had told the plaintiff that he intended to go to Australia. The robber has also been seen, early in the morning after the robbery, coming from a public entry leading to the back door of the plaintiff's house. These facts show a want of probable cause for the arrest.¹

In civil cases, however, it is lawful for a person to begin a suit on very slight grounds of claim ;² and a greater latitude in the application of the doctrine of reasonable cause must be exercised in such cases before the party can be justly deemed liable for a malicious prosecution. A person may try the question of a right for the mere purpose of settling a doubt in his own mind, and fixing a safe rule to act upon ; though he may expect a decision contrary to his wishes. But the plaintiff's object in such a case must be the real desire to have a decision on the question raised, and not by indirection to accomplish some other purpose under coercion.³

It is generally laid down that the question of probable cause is to be decided by the circumstances existing at the time of the arrest, and not by the turn of subsequent events.⁴ If the defendant had then such grounds for supposing the plaintiff guilty of the crime charged as would satisfy a cautious man, he violates no duty to the plaintiff

¹ *Busst v. Gibbons*, 30 Law J. Ex. 75.

² See *Wren v. Weild*, Law R. 4 Q. B. 730; *Green v. Button*, 2 Crompt. M. & R. 707.

³ See *Ravenga v. Mackintosh*, 2 Barn. & C. 693.

⁴ *Contra*, *Adams v. Lisber*, 3 Blackf. 241; *Hickman v. Griffin*, 6 Mo. 37. See Bigelow's L. C. Torts, 198-200.

in procuring his arrest, though such grounds be immediately and satisfactorily explained away, or the truth discovered by the prosecutor himself. For example: The defendant procures the plaintiff to be arrested for the larceny of certain ribbons, on reasonable grounds of suspicion. He afterwards finds the ribbons in his own possession. He is not liable.¹

On the other hand, in accordance with the same principle, if the prosecutor was not possessed of facts justifying a belief that the accused was guilty of the charge, it matters not that subsequent events (short of a judgment of conviction, as to which presently) show that there existed, in fact, though not to the prosecutor's knowledge, circumstances sufficient to have justified an arrest by any one cognizant of them. He has violated his duty in procuring the arrest. For example: The defendant to an action for malicious prosecution pleads facts sufficient to constitute probable cause, but does not allege that he was cognizant of such facts when he procured the plaintiff's arrest. The plea is not good.²

It has, however, been frequently decided that a judgment of conviction is conclusive evidence of the existence of probable cause; ³ unless it can be shown that the judgment was obtained by fraud or perhaps perjury.⁴ This, however, is inconsistent with the rule that the question of probable cause is to be determined by the state of facts within the prosecutor's knowledge (supposing him to have acted *bona fide* upon such facts) at the time of the arrest. Judgment of conviction does not (in fact) prove that the prosecutor at the time had reasonable grounds to sus-

¹ Swain v. Stafford, 4 Ired. 392; s. c. Ib. 398.

² Delegal v. Highley, 3 Bing. N. C. 950. But see Adams v. Lisber and Hickman v. Griffin, *supra*.

³ See *ante*, p. 72; Bigelow's L. C. Torts, 196.

⁴ Burt v. Place, 4 Wend. 591; Payson v. Caswell, 22 Maine, 212.

pect the guilt of the prisoner, — such grounds, that is, as would have induced a cautious man to arrest the suspected person. It would be more accurate to say that the Statute of Malicious Appeals, which in reality lies at the foundation of the law concerning criminal prosecutions, by plain implication exempts the prosecutor (of felony) from liability in case of the conviction of the prisoner.¹

Turning from cases of conviction, it is to be observed that though the prosecutor be in a situation to show that he had probable cause, still if he did not believe the facts and rely upon them in procuring the arrest, he has committed a breach of duty towards the person arrested. For example: The defendant goes before a magistrate and prefers against the plaintiff the charge of larceny, for which there was reasonable ground in the facts within the defendant's cognizance. The defendant, however, does not believe the plaintiff guilty, but prefers the charge in order to coerce the plaintiff to pay a debt which he owes to the defendant. The defendant has acted without probable cause.²

¹ *Ante*, p. 76. If the statute be followed, this will be true only in cases of conviction of what was felony at common law. In other cases, the conviction could not, by the statute, bar an action; nor could it bar an action for malicious prosecution on grounds of estoppel, because the parties to the two actions are different; the criminal suit being between the State and the prisoner. The judgment could not, properly speaking, be more than *prima facie* evidence of probable cause, even if, of itself alone, it could be considered as amounting to any evidence on that point. The question before the petit jury, as has elsewhere been observed (*post*, p. 82), is, not whether there was probable cause for the arrest, within the knowledge of the prosecutor, but whether the prisoner is guilty. However, the language of the decisions is that the conviction is conclusive of probable cause; and the author at one time considered this to be correct. Bigelow's L. C. Torts, 196, 197.

² *Broad v. Ham*, 5 Bing. N. C. 722. Had the defendant believed the charge, it could not have been material that he procured the arrest mainly for the purpose of getting his pay.

The authorities are in conflict as to the effect of a discharge of the plaintiff by a committing magistrate, before whom he has been arrested on suspicion. It is held by some of the authorities that the discharge is *prima facie* evidence of a want of probable cause, on the ground that such a magistrate is entitled to bind the party over or hold him to bail on very slight evidence, such as would amount to probable cause.¹ His decision discharging the prisoner is a decision that no reasonable ground has been shown by the prosecutor for arresting the prisoner. The contrary has been held by other courts, on the ground that a magistrate's decision is no evidence in a prosecution of the same party before the grand jury.²

This latter rule of law, as explained, would require the courts to decide that a commitment of the prisoner by the magistrate could not be evidence of probable cause. And if probable cause had, in all situations, been understood in the one natural sense of facts furnishing an adequate motive to the party requiring the arrest, such a result would have been inevitable. But, apparently through a second confusion as to the true meaning of probable cause, it has been decided that a magistrate's commitment of the prisoner for trial is evidence³ (though not conclusive) of the existence of proper ground for instituting the prosecution.⁴

If this were sound doctrine, that the magistrate's commitment is *prima facie* evidence of probable cause, it ought to be equally true that the magistrate's discharge would be *prima facie* evidence of want of probable cause. The soundness, however, of the doctrine that either commitment or conviction is evidence of probable cause in the proper sense is

¹ *Bostick v. Rutherford*, 4 Hawks, 83; *Williams v. Norwood*, 2 Yerg. 329.

² *Israel v. Brooks*, 23 Ill. 575.

³ *Bacon v. Towne*, 4 Cush. 217; *Graham v. Noble*, 13 Serg. & R. 270; *Burt v. Place*, 4 Wend. 591; *Reynolds v. Kennedy*, 1 Wils. 232.

⁴ *Bacon v. Towne*, and *Burt v. Place*, *supra*.

so doubtful that it cannot be safely appealed to in the decision of the conflict mentioned.

Taking probable cause in its ordinary and natural sense, the action of the magistrate should have no bearing upon the question. That action merely determines whether the facts adduced afford sufficient ground for committing the prisoner. In such preliminary proceeding, the magistrate has nothing to do with the question whether the prosecutor acted upon sufficient cause.

The mere abandonment of the (criminal) prosecution by the prosecutor, and the acquittal of the prisoner, are no evidence of a want of probable cause.¹ Such facts in themselves show nothing except that the prosecution has failed. It may still have been undertaken upon reasonable grounds of suspicion.² And the same is true of an entry of *nolle prosequi*.³ But the circumstances of the abandonment of the prosecution may be such as to indicate *prima facie* a want of probable cause. For example: The defendant presents two bills for perjury against the plaintiff, but does not himself appear before the grand jury, and the bills are ignored. He presents a third bill, and, on his own testimony, the grand jury return a true bill. The defendant now keeps the prosecution suspended for three years, when the plaintiff, taking down the record for trial, is acquitted; the defendant declining to appear as a witness, though in court at the time and called upon to testify. These facts indicate the absence of probable cause.⁴

The mere omission, likewise, to appear and prosecute a civil action, by reason of which the defendant obtains a judgment of default, is no evidence of a want of probable

¹ *Willans v. Taylor*, 6 Bing. 186; *Johnson v. Chambers*, 10 Ired. 287; *Vanderbilt v. Mathis*, 5 Duer, 304; s. c. *Bigelow's L. C. Torts*, 178.

² The magistrate or grand jury decides whether there is reasonable ground for putting the prisoner upon trial; the petit jury decides whether the prisoner is guilty. .

³ *Yocum v. Polly*, 1 B. Mon. 358.

⁴ *Willans v. Taylor*, 6 Bing. 186.

cause.¹ The voluntary discontinuance of such a suit, however, is deemed to indicate the want of probable cause for instituting the action. For example: The defendant procures the plaintiff to be arrested and held to bail on a charge of slander. The cause coming on for trial, the then plaintiff appears, discontinues the suit, and pays the costs. This is evidence of a want of reasonable ground for the action.²

If the prosecutor take the advice of a practising lawyer upon the question whether the facts within his knowledge are such as to justify a complaint, and act *bona fide* upon the advice given, he will be protected even though the counsel gave erroneous advice. That is, he will be protected, though in fact he might not have been in possession of facts such as would have justified a prosecution without the advice. For example: The defendant states to his attorney the facts in his possession concerning a crime supposed to have been committed by the plaintiff. The attorney advises the defendant that he can safely procure the plaintiff's arrest. The defendant is not liable, though the facts presented did not in law constitute probable cause.³

The prosecutor must, however, as the proposition itself states, act *bona fide* upon the advice given, if he rest his defence upon such a ground alone.⁴ For example: The

¹ *Burhans v. Sanford*, 19 Wend. 417. So if the suit be terminated by a compromise, and then discontinued, no action can be maintained. *Mayer v. Walter*, 64 Penn. St. 283.

² *Burhans v. Sanford*, *supra*.

³ *Snow v. Allen*, 1 Stark, 502. See *Cooper v. Utterbach*, 37 Md. 282; *Olmstead v. Partridge*, 16 Gray, 381.

⁴ The prosecutor might plead both the advice of counsel and also the facts themselves within his knowledge; and if then it should appear that he did not act upon the advice in good faith, or that he did not state all the facts to the attorney, he would still be protected, probably, if the facts should show a reasonable ground for the arrest.

defendant procures the arrest of the plaintiff, having first taken the advice of legal counsel upon the facts. This advice is erroneous, and it is not acted upon in good faith, believing it to be correct; the arrest being procured for the indirect and sinister motive of compelling the plaintiff to sanction certain illegal bonds. The defendant is liable.¹

If, after taking legal advice and before the arrest, new facts come to the knowledge of the prosecutor, he cannot justify the arrest as made on advice, unless such new facts furnish further evidence of the guilt of the suspected party. If they should be of a contrary nature, casting new doubt upon the party's guilt, the prosecutor cannot safely proceed to procure an arrest except upon new advice; unless indeed the entire chain of facts in his possession shall satisfy the court that there existed a reasonable ground for his action. To make use of the advice given, when the new facts indicate that the accused is not guilty, is not to act upon the advice in good faith.²

Again, if the only defence be that the prosecutor acted upon legal advice, a breach of duty may still be made out if it appear that the prosecutor untruly stated to the attorney the facts within his knowledge. The plaintiff's case, so far as it rested on the proof of want of probable cause, would be established by showing that the actual facts known to the prosecutor (differing from those on which the advice was obtained) showed that he had no reasonable ground for instituting the prosecution.

The result is, that the defence of advice of legal counsel, to establish probable cause, must not be resorted to as a mere cover for the prosecution, but must be the result of an honest and fair purpose; and the statement made at

¹ *Revenge v. Mackintosh*, 2 Barn. & C. 693.

² See *Cole v. Curtis*, 16 Minn. 182.

the time by the prosecutor to his counsel must be full and true, and consistent with that purpose.¹

This defence of having acted upon legal advice is a strict one, confined to the case of advice obtained from lawyers admitted to practise in the courts of the State. Such persons are certified to be competent to give legal advice, and their advice when properly obtained and acted upon is conclusive of the existence of probable cause. But if the prosecutor act upon the advice of a person not a lawyer, and therefore not declared competent to give legal advice, the facts must be shown upon which the advice was obtained, however honestly and properly it was sought and acted upon. It is not even enough that the advice was given by an officer of the law, professing familiarity with its principles, if such a person were not a lawyer. For example: The defendant procures the arrest of the plaintiff upon advice of a justice of the peace, with whom he has been in the habit of advising on legal matters; but the justice is not a lawyer. This is not evidence of probable cause.²

The want of probable cause cannot be inferred from mere evidence of malice, since a person may maliciously prosecute another whom he has the strongest evidence against, — whom, indeed, he caught in the commission of the crime.³ There must be some evidence, apart from the proof of malice, indicating that the prosecutor instituted the suit under circumstances which would not have induced a cautious man to act.

It should be observed, finally, that the question of want of probable cause is a question of law, to be determined by the court upon the facts proved. The facts material to

¹ *Walter v. Sample*, 25 Penn. St. 275.

² *Beal v. Robeson*, 8 Ired. 276.

³ *Turner v. Ambler*, 10 Q. B. 252, 257; *Boyd v. Cross*, 35 Md.

the question of probable cause must be found by the jury ; and the judge decides, as matter of law, whether the facts so found establish probable cause or a want of it.¹

§ 4. OF MALICE.

The plaintiff, to make out a breach of duty by the defendant, must also produce evidence such as will indicate that the prosecution was instituted with malice towards the accused.² Malice cannot be inferred from the mere proof of a want of probable cause,³ any more than want of probable cause can be inferred from mere proof of malice.⁴ A man may institute a prosecution against another without the least feeling of malice towards him, though he had not adequate grounds for doing so.⁵

The jury must have the right, and it is their duty, to pass upon the question of malice as a distinct matter. There is, therefore, no such thing in the law of malicious prosecution as the implied malice or malice in law of slander and libel.⁶ For example : Evidence having been introduced in an action for a malicious prosecution, which showed that the defendant had instituted the prosecution without probable cause, the judge instructs the jury that there are two kinds of malice, malice in law and malice in fact, and that in the present case there was malice in law because the prosecution was wrongful, being without probable cause. This is erroneous ; the existence of malice being a question for the jury.⁷

¹ *Turner v. Ambler*, *supra*. See, also, *Driggs v. Burton*, 44 Vt. 124; *Boyd v. Cross*, 35 Md. 194.

² That the malice should be against the party prosecuted was laid down in *Dietz v. Langfitt*, 63 Penn. St. 234.

³ *Vanderbilt v. Mathis*, 5 Duer, 304; *Bigelow's L. C. Torts*, 178.

⁴ *Griffin v. Chubb*, 7 Tex. 603, 617.

⁵ *Ib.* p. 616.

⁶ *Mitchell v. Jenkins*, 5 Barn. & Ad. 588.

⁷ *Ib.*

The evidence offered to establish the facts which go to show the want of probable cause may, however, indicate the existence of malice; and in such a case the jury may find the existence of a malicious motive without further proof. But there must be some evidence indicating actual malice.¹

It is not necessary, however, notwithstanding the language of some of the old decisions,² to prove the existence of an intense hostility and rancor: evidence of slight hostility, or of the existence of any sinister motive, is sufficient. For example: The defendant is shown to have displayed much activity and zeal in a prosecution of the plaintiff. This may be considered as evidence of malice.³

§ 5. OF DAMAGE.

If the charge upon which the prosecution was instituted was of the commission of a crime, such as (being untrue) would have constituted slander had it not been preferred in court, the plaintiff, upon proof of the termination of the prosecution, the want of probable cause, and malice, has made out a case, and is entitled to judgment. It is not necessary for him to prove that he has sustained any pecuniary damage. For example: The defendant causes the plaintiff to be indicted for the stealing of a cow, falsely,

¹ *Griffin v. Chubb*, 7 Tex. 603; *Levy v. Brannan*, 39 Cal. 485. Some of the cases are inconsistent with this proposition, but such are not now accepted, either in this country or in England. The existing state of the law may be seen in the cases already cited in the present section, and in the following: *Boyd v. Cross*, 35 Md. 194; *Merkle v. Ottensmeyer*, 50 Mo. 49; *Barron v. Mason*, 31 Vt. 189. It will be noticed that in England the doctrine concerning malice in law (by which malice must be inferred from proof of the want of probable cause) was repudiated, as inapplicable to the law of malicious prosecution, by the King's Bench, in *Mitchell v. Jenkins*, 5 Barn. & Ad. 588, above referred to.

² *Savile v. Roberts*, 1 Salk. 13.

³ *Straus v. Young*, 33 Md. 246.

without probable cause, and of malice. The plaintiff is entitled to recover without producing evidence that he has sustained any actual damage.¹

But it is only for the prosecution of a charge the verbal imputation of which *in pais* would constitute slander that the mere institution of the prosecution can be actionable without specific damage.² For example: The defendant falsely prefers against the plaintiff a criminal charge of assault and battery, without cause and with malice. The plaintiff cannot recover for a malicious prosecution without proof of actual pecuniary damage.³

It follows that this action for a malicious prosecution cannot be maintained without proof of special damage when the prosecutor has procured the indictment of the plaintiff for the commission of that which is not a crime or a misdemeanor involving moral turpitude. For example: The defendant procures the plaintiff to be indicted for the killing of the former's cattle. The plaintiff must prove special damage; the offence, though charged as a crime, being only a trespass.⁴

§ 6. OF ANALOGOUS REMEDIES.

If the prosecution fail by reason of the circumstance that the court in issuing its warrant exceeded its jurisdiction, or that the warrant or indictment was defective, it is not clear whether the accused should sue for malicious prosecution or for slander; supposing the charge to have been defamatory. It would give him an obvious advantage to sue for slander since then he would not be compelled to

¹ See *Frierson v. Hewitt*, 2 Hill (S. C.), 499.

² *Frierson v. Hewitt*, *supra*.

³ *Ib.* The last two examples are imaginary, but they are fully sustained by the case cited.

⁴ *Frierson v. Hewitt*, *supra*. This was the actual case before the court.

prove a want of probable cause or the existence of malice. Many of the authorities consider the right remedy to be through an action for malicious prosecution.¹ The question perhaps turns upon the meaning attached to the term "prosecution." Can a person be said to have been prosecuted in the legal sense when, by reason of defect of process or the want of jurisdiction, there was only an attempt to prosecute? The cases which answer this in the negative may in a narrow sense be right.² But it is not denied in any of the authorities that an action of some form is maintainable in such a case. The decisions which hold an action for a malicious prosecution maintainable do not declare that an action for slander is not proper: proceeding upon the common-law distinctions between trespass (an arrest having been made, which, when wrongful, is a trespass) and case as forms of action, they merely declare that case is maintainable;³ and the action for slander is an action on the case. Nor do the cases which have decided that an action for malicious prosecution is not proper, declare that an action for slander could not be maintained. They merely hold that, where a trespass is the gist of action, case is not the proper form of action; but in an action for slander, no trespass is alleged, — at least, as the gist of action.⁴

In this connection, attention should be directed to actions for abuse of the process of the courts. An action is given by law for such an act without requiring the plaintiff to

¹ *Pippet v. Hearne*, 5 Barn. & Ald. 634; *Morris v. Scott*, 21 Wend. 281; *Stone v. Stevens*, 12 Conn. 219; *Hays v. Younglove*, 7 B. Mon. 545; *Shaul v. Brown*, 28 Iowa, 37. See *Braveboy v. Cockfield*, 2 McMull. 270; *Turpin v. Remy*, 3 Blackf. 210.

² *Braveboy v. Cockfield*, and *Turpin v. Remy*, *supra*. See *Bodwell v. Osgood*, 3 Pick. 379.

³ *Pippet v. Hearne*, and *Morris v. Scott*, *supra*.

⁴ In the suit for malicious prosecution, the arrest was the gist and only ground of action in the cases referred to.

prove either the termination of the proceeding in which the abuse of process has taken place, or the want of probable cause for instituting that proceeding. For example: The defendant under process of the court in an action for a debt not due, procures the plaintiff through duress to deliver valuable property (a ship's register) to him. The defendant is liable in damages, without evidence of the termination of the suit or of the want of probable cause.¹ Nor (probably) need malice be proved.²

To maintain such an action, however, the plaintiff's case must be something other than a proceeding for a malicious prosecution. The ground of action must be, not a false prosecution (that is, a prosecution upon a demand or accusation which has no foundation in fact), but an unlawful use of legal process; and such an act may be committed as well in the course of a well-founded prosecution as in a false one. If the wrong suffered consist in an unlawful arrest, the action will be for a false imprisonment, of which hereafter; if it consist in an unlawful extortion of a contract or of property, the action will in substance be for duress; an example of which has already been given.³ Other instances may be found in actions for the levying of an execution for double the sum due,⁴ and in the wrongful levy of an attachment.⁵

¹ *Grainger v. Hill*, 4 Bing. N. C. 212; s. c. Bigelow's L. C. Torts, 184.

² No question was raised on this point in *Grainger v. Hill*, *supra*; but there can be no doubt of the correctness of the statement of the text, if the action was not in reality for a malicious prosecution.

³ In case a contract were thus obtained, the injured party could elect to affirm the validity of the contract, and sue for the duress, or he could deny the validity of the agreement, and plead the duress in an action upon it.

⁴ *Sommer v. Wilt*, 4 Serg. & R. 19.

⁵ *Stuart v. Cole*, 46 Ala. 646.

CHAPTER IV.

CONSPIRACY.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty to forbear to carry out, wholly or partly, against him, to his damage, any unlawful undertaking entered into with C.

The law of conspiracy, in its civil aspect, is often treated as a branch of the law of malicious prosecution; with which it has, indeed, in one of its features, a close connection. Civil actions for conspiracy were formerly instituted in most if not in all cases for redress on account of unlawful combinations for instituting criminal prosecutions of the grade of felony. Combinations for other unlawful purposes were redressed in other forms of actions: generally, it appears, in an action of deceit; sometimes, however, in an action of trespass.

Distinct and peculiar rules of law prevailed in former times concerning conspiracies of the first-named class. A writ of conspiracy could be sustained only by proof of an actual combination to indict the plaintiff of felony, with the other elements of an action for malicious prosecution. Failure to prove the combination was fatal, even though enough were proved to establish a right of action for a simple false prosecution. The action for the latter offence was a distinct proceeding. In later times, the writ of conspiracy was employed for the redress of prosecutions below the grade of felony; and then it became unnecessary in that action to establish an actual combina-

tion, notwithstanding the allegation of conspiracy. The law, however, relating to prosecutions for *felony* persisted, and the plaintiff failed if the evidence showed that the prosecution was instituted or procured by but one person.¹

This distinction, however, has in modern times become obsolete. An action for an alleged conspiracy can now be maintained in any case otherwise proper, though the plaintiff is unable to prove that the unlawful act complained of was undertaken by more than one person.² This has reduced the whole subject of conspiracy, in its civil aspect, to an harmonious whole, and justified, if not required, its separation from the subject of malicious prosecution.

Indeed, the result has been to remove the subject of conspiracy, in one aspect, from the body of the law. The existence of an actual conspiracy being unnecessary to the plaintiff's action, nothing remains, if he prove against but one person, except that which would be the ground of action against that person had he been alone sued. The case would then be nothing more than an action for deceit, malicious prosecution, false imprisonment, or other like tort, according to the nature of the wrong actually provable. If this were the only aspect of the civil law of conspiracy as now existing, the subject might be omitted; but it is not. The plaintiff may attempt to prove against all, or several of the defendants, for the better security of his damages; and it must then be often ascertained how the different defendants can be liable in law, supposing they have not all actually participated in the wrong complained of. And then again there are questions concerning the necessity of the proof of

¹ See upon this subject the historical notes on malicious prosecution and conspiracy, in the author's *Leading Cases on Torts*, pp. 190-196, 210-214.

² *Parker v. Huntington*, 2 Gray, 124.

damages to be considered. The subject must therefore be still treated as a distinct branch of law, though of much narrower proportions than formerly.

In the sense of the existing law, a conspiracy is simply a confederacy or combination of two or more persons to commit an unlawful act. For the purposes of an indictment, the mere formation of such a union is sufficient: for the purposes of a civil action, it is not, as will presently appear.

§ 2. OF PARTICIPATION IN THE CONSPIRACY.

A conspiracy to commit an unlawful act, and the doing of some overt act in pursuance of the conspiracy to the damage of the plaintiff, create a good cause of action against all the parties to the conspiracy. But it is not necessary that the overt act should be participated in by all of the conspiring parties: upon the committing of an act inflicting damage, in pursuance of the common plan, each and all of the parties to the plan become liable, though the act be committed by only one of them, and he be not sued. Or (to state the proposition in another form) where two or more have entered into a conspiracy to injure the plaintiff, any act done by either of the conspirators in furtherance of the common object, and in accordance with the general plan of the conspirators, becomes the act of all; and each conspirator is responsible for such act. For example: The defendant conspires with others to cheat and defraud the plaintiff in the sale of certain property through fraudulent misrepresentations, and the scheme is carried into effect, though by some other member of the conspiracy than the defendant. The defendant is liable, though he himself made none of the misrepresentations complained of.¹

. ¹ Page v. Parker, 43 N. H. 363.

Indeed, if an individual connect himself with others in a conspiracy to commit an unlawful act, it is not permitted him, when called upon to respond for the damage inflicted, to say that the plan was concocted before he became an associate. By connecting himself with those who formed the conspiracy, he adopts their prior acts and purposes, and becomes liable with the rest.¹ For example: The defendant's agent, having authority to institute suits on behalf of his principal, prosecutes the plaintiff in the name of the defendant, maliciously and without probable cause. This is done without the instigation or direction of the defendant; but the latter upon becoming cognizant of the act of his agent adopts it and suffers the agent to continue the prosecution. The defendant is liable to the same extent as if he had joined with the agent at the outset in concocting the plan of harassing the plaintiff.²

The same rule of law prevails in case the conspirators employ others to commit the overt act. They violate a legal duty to the injured party no less than if they had personally executed the unlawful scheme. For example: The defendant and others conspire to prevent the plaintiff, an actor, from performing at a theatre, and, in pursuance of the conspiracy, employ others to go to the theatre and interrupt the plaintiff in his part of the play, who carry out the purpose. The defendant is liable.³

Nor is it material, where the object of the unlawful combination is plunder and gain to the conspirators, that some of them derive no benefit from the execution of the scheme. They are equally liable, though the overt acts were committed by others who refused to divide, or failed to obtain,

¹ *Den d. Stewart v. Johnson*, 3 Harr. (N. J.) 87.

² See *Weston v. Beeman*, 27 Law J. Ex. 57. This, however, is merely a phase of the doctrine of principal and agent. Indeed, that is, perhaps, true of the whole section under consideration.

³ *Gregory v. Brunswick*, 6 Man. & G. 205.

the spoil. For example: Several agents, of whom the defendant is one, conspire to injure their common principal, and succeed; the defendant is liable though he derives no benefit from the success.¹

It is equally well settled that though there was no intention of making a profit out of the scheme, but only a desire to harass and inflict loss upon the plaintiff, the action is maintainable. For example: The defendant, an attorney, knowing that his client has no just claim against the plaintiff, maliciously and without probable cause, procures, in concert with his client, an arrest and civil prosecution of the plaintiff. This is a breach of legal duty, and the defendant is liable for the injury sustained by the plaintiff.²

To make a party liable with others for a conspiracy resulting in damage, he must either have originally colluded with the rest, or afterwards joined them as an associate, or actually participated in the execution of the scheme. A defendant cannot be found guilty by evidence of mere silent observation, even with approval, of the conspiracy. For example: The defendant is shown to have been cognizant of, and to have (silently) approved, the unlawful enticing away of the plaintiff's daughter. This is not sufficient to establish a conspiracy and breach of duty; the defendant not having thereby become a party to the plot.³

§ 3. OF THE TERMINATION OF THE PROSECUTION.

In the case of an action for a conspiracy (carried out) to maliciously prosecute the present plaintiff, it must be made to appear that the prosecution has been terminated; the meaning of which has been explained in the chapter on malicious prosecution.⁴

¹ *Walsham v. Stainton*, 1 DeG. J. & S. 678. See, also, *Stiles v. White*, 11 Met. 356; *Jernegan v. Wainer*, 12 Tex. 189.

² *Stockley v. Hornridge*, 8 Car. & P. 11.

³ *Brannock v. Bouldin*, 4 Ired. 61.

⁴ *Ante*, pp. 72-77.

§ 4. OF THE WANT OF PROBABLE CAUSE.

If the object and result of the conspiracy were to institute a malicious prosecution against the now plaintiff, it will be necessary for him to show that the prosecution was instituted without probable cause. The formation of a conspiracy to prosecute, though carried out with malice, is not sufficient, since a man may be maliciously prosecuted upon adequate grounds;¹ and it is not material that a conspiracy was effected to carry on the prosecution. A conspiracy, civilly, is not *per se* an unlawful act.²

§ 5. OF MALICE.

The subject of malice has been mentioned as connected with an action for conspiracy; but the formation of a conspiracy to do an unlawful act is all that need be proved. Malice, in the sense of ill-will and hostility to the intended victim of the conspiracy, need not exist.³ For example: The defendant, an attorney, prosecutes the plaintiff under an award offered him if he will so prosecute for an alleged offence against the instigator of the prosecution; the defendant knowing that no such offence had been committed. This is sufficient evidence of malice.⁴

§ 6. OF DAMAGE.

The essence of a conspiracy, so far as it justifies a civil action for damages, is a concert or combination to defraud

¹ *Ante*, p. 85.

² *Hutchins v. Hutchins*, 7 Hill, 104; s. c. *Bigelow's L. C. Torts*, 207.

³ Compare the doctrine of malice in actions for malicious prosecution. *Ante*, p. 87.

⁴ See *Stockley v. Hornridge*, 8 Car. & P. 11, the principle of which will justify the example given. The attorney would not be permitted in such a case to say that he was acting under the instructions of his client.

or to cause other unlawful injury to person or property, which actually results in damage to the person or property of the party defrauded or otherwise injured.¹ A conspiracy to do an unlawful act is not a ground of civil redress if it do not result in an overt act causing damage.² For example: The defendants are alleged to have conspired together maliciously and without probable cause to institute, and to have instituted, an action against the plaintiff in the name of a third person for their benefit. No damage is alleged. The plaintiff cannot recover.³

If the conspiracy result in depriving the object of it of some benefit which he hoped and expected to obtain, but over which he had no right or legal interest, he has not sustained any damage within the meaning of the law. For example: The defendants conspire to induce the plaintiff's father to revoke a will in the plaintiff's favor, and succeed in obtaining a revocation. The plaintiff suffers no damage in the legal sense.⁴ Again: The defendants successfully conspire to cause the plaintiff's debtor to convey away his property in fraud of the plaintiff's rights as a creditor. The defendants are not liable in an action for conspiracy; the proper remedy (supposing one to exist) being by attachment under a creditor's bill to set aside the conveyance as fraudulent.⁵

¹ *Place v. Minster*, 65 N. Y. 89.

² *Hutchins v. Hutchins*, 7 Hill, 104; s. c. *Bigelow's L. C. Torts*, 207; *Kimball v. Harman*, 34 Md. 407.

³ *Cotterell v. Jones*, 11 Com. B. 713.

⁴ *Hutchins v. Hutchins*, *supra*.

⁵ *Austin v. Barrows*, 41 Conn. 287. See *Adler v. Fenton*, 24 How. 407; *Lamb v. Stone*, 11 Pick. 527. The case of *Kimball v. Harman*, 34 Md. 407, is another and different kind of example.

CHAPTER V.

ASSAULT AND BATTERY.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty to forbear (1) to offer with force to do hurt to his person, within reach; or (2) to hit or touch him in anger or rudeness, or in the commission of an unlawful act.

The subject of the last chapter (conspiracy) marks the shading off of the element of malice in its various forms as exhibited in the first three chapters of the book, and prepares the way for the second class of cases in which, for the most part, the matter of the state of mind of the defendant towards the plaintiff becomes (so far as the right of action is concerned) immaterial; that is, the defendant cannot offer to justify the act complained of by alleging that he did not intend to commit it,¹ unless indeed he can show that it was compelled, against his will. The act shows presumptively the intention. The law of assault and battery, or the duty above stated, is the first subject for examination under this principle.

§ 2. OF ASSAULTS.

An assault is an attempt, with force, to do hurt to another's person, within reaching distance.² It is an

¹ The extent of the damages may, however, be affected by the question of actual intent.

² The term, however, is loosely used in the books, and often, but inaccurately, made to include a battery.

attempt to do harm, stopping short of actual execution. If the attempt be carried out by physical contact, the act becomes a battery; but the act is equally unlawful and actionable when it stops with a mere attempt to inflict hurt. For example: The defendant, advancing in a threatening attitude with the purpose of striking the plaintiff, is prevented by third persons from carrying out his design at a moment when, but for the interruption, he would presently have struck the plaintiff. This is a breach of legal duty, and the defendant is liable.¹

It has been said² that the question of intention is irrelevant in the law of assault and battery; but this is true of assault only when the offence alleged was so committed as to show that the plaintiff had reason to believe that the defendant was making an attempt to harm the plaintiff's person. If the supposed assault were committed in such a manner that the plaintiff must have known that no present violence was intended, the act is not unlawful. For example: The defendant, on drill as a soldier, putting his hand upon his sword, says to the plaintiff, "If it was not drill-time, I would not take such language from you." This is not an assault, since the language used shows that there was no present intention to commit that offence.³

If, however, the plaintiff have reason to believe that harm was intended, the defendant will be liable even though he did not in fact intend to harm the plaintiff. For example: The defendant in an angry manner points an unloaded gun at the plaintiff, and snaps it, with the apparent purpose of shooting. The gun is known by the defendant to be unloaded; but the plaintiff does not know the fact, and has no reason to suppose that it is not loaded. The defend-

¹ *Stephens v. Myers*, 4 Car. & P. 349; s. c. Bigelow's L. C. Torts, 217.

² *Supra*, p. 98.

³ See *Tuberville v. Savage*, 1 Mod. 3.

ant is liable for an assault, though he could not have intended any harm to the plaintiff.¹

The parties must generally have been within reach of each other, not necessarily within arm's reach, for an assault may be committed (as already appears) by means of a weapon or missile; and in such a case it is only necessary that the plaintiff should have been within certain reach of the projectile. And even when the alleged assault is committed with the fist, it is not necessary that the plaintiff should have been within arm's reach of the defendant, provided the defendant was advancing to strike the plaintiff, and was restrained by others from carrying out his purpose when almost within reach of the plaintiff. For example: The defendant advances towards the plaintiff in an angry manner with clenched fist, saying that he will pull the plaintiff out of his chair, but is arrested by a person sitting next to the plaintiff between him and the defendant. The act is an assault, though the defendant was not near enough to strike the plaintiff.²

In like manner, if the defendant should cause the plaintiff to flee in order to escape violence, he may be guilty of an assault, though he was at no time within reach of the plaintiff: it is enough that flight or concealment becomes necessary to escape the threatened evil. For example: The defendant on horseback rides at a quick pace after the plaintiff, then walking along a foot-path. The plaintiff runs away, and escapes into his garden; at the gate of which the defendant stops on his horse, shaking his whip at the plaintiff, now beyond danger. This is an assault.³

¹ *Beach v. Hancock*, 27 N. H. 223. *Quere*, if the defendant presented a loaded pistol at the plaintiff, saying he did not intend to shoot, would this be an assault? See *Blake v. Barnard*, 9 Car. & P. 626.

² *Stephens v. Myers*, 4 Car. & P. 349; s. c. *Bigelow's L. C. Torts*, 217.

³ *Mortin v. Shappee*, 3 Car. & P. 373.

It will be observed, from the statement of the duty which governs this branch of the law, that a mere assault is a civil offence; and hence the person assaulted has a right of action, though he may not have suffered any loss or detriment from the offence. In such a case, however, he could (probably) recover only nominal damages.¹

§ 3. OF BATTERIES.

To hit or touch a person in anger or rudeness, or in the commission towards a third person of an unlawful act, is a battery. A battery, therefore, is mainly distinguishable from an assault in the fact that physical contact is necessary to accomplish it. But, as the definition indicates, this contact need not be effected by a blow: any forcible contact may be sufficient. For example: The defendant, an overseer of the poor, cuts off the hair of the plaintiff, an inmate in the poor-house, contrary to the plaintiff's will, and without authority of law. This is a battery, and the defendant is liable in damages.² Again: The defendant, in passing through a crowded hall, pushes his way in a rude manner against the plaintiff. This is also a battery.³

It is not necessary that the defendant should come in contact with the plaintiff's body. It is sufficient if the blow or touch come upon the plaintiff's clothing. For example: The defendant, in anger or rudeness, knocks off the plaintiff's hat. This is enough to constitute a battery.⁴

Indeed, it is not necessary that the plaintiff's body or

¹ The damages recovered in *Stephens v. Myers*, *supra*, were one shilling.

² *Forde v. Skinner*, 4 Car. & P. 239.

³ *Cole v. Turner*, 6 Mod. 149; s. c. *Bigelow's L. C. Torts*, 218.

⁴ Mr. Addison gives this as an example of a battery, without citing authority; but there can be no doubt of its correctness. *Addison, Torts*, 571 (4th Eng. ed.).

clothing be touched. To knock a thing out of the plaintiff's hands, such as a staff or cane, would clearly be a battery; and the same is true of the striking a thing upon which he is resting for support, if the effect be to cause a fall or concussion to the plaintiff. For example: The defendant strikes a horse upon which the plaintiff is riding, causing the animal to plunge and throw the plaintiff. This is a battery.¹ Again: The defendant drives a vehicle against the plaintiff's carriage, throwing the plaintiff from his seat. This also is a battery.² Again: The defendant runs against and overturns a chair in which the plaintiff is sitting. This, too, is a battery.³

It appears from the foregoing examples that it is not necessary to constitute a battery that the touch or blow or other contact should come directly from the defendant's person. Indeed, a battery may be committed at any distance between the parties if only some violence be done to the plaintiff's person. The hitting one with a stone, or an arrow, or other missile, is no less a battery than the striking one with the fist. It is not necessary even that the object cast should do physical harm: the battery consists in the unpermitted contact, and not in the damage. For example: The defendant spits or throws water upon the plaintiff. This is a battery, though no harm be done.⁴

¹ See *Dodwell v. Burford*, 1 Mod. 24.

² *Hopper v. Reeve*, 7 Taunt. 698.

³ *Ib.* It was held immaterial in this case whether the chair or carriage belonged to the plaintiff or not.

⁴ See *Regina v. Cotesworth*, 6 Mod. 172; *Pursell v. Horn*, 8 Ad. & E. 602. A word of explanation is necessary as to the latter case. The plaintiff had sued for a battery by throwing of water on him, and had failed to prove it, though he proved certain consequential injuries, and had a verdict for below forty shillings. The damages not reaching forty shillings, the plaintiff was not entitled to the costs given him, by reason of failing to prove a battery. He now attempted to show that he had not sued for a battery at all, or, if he had, that a battery had been admitted by the defendant's plea;

A battery may be committed without the least intention to do the plaintiff harm: it may be the result simply of negligence. For example: The defendant, a soldier, handles his arms so carelessly in drilling as to hit the plaintiff with them. This is a battery, though the act was not intended.¹ The above-mentioned case of the defendant running into the plaintiff's carriage is another example.²

Indeed, a person may be guilty of a battery where his act is directly caused by another person, provided the defendant was engaged at the time in an unlawful proceeding. For example: The defendant, when about to discharge a gun unlawfully at a third person, is jostled just as the gun is fired, and the direction of the shot is changed so as to cause the plaintiff to be hit. This is a battery.³

But while a battery may be committed without intention, it is not to be supposed that every unintentional physical violence done to another will constitute a battery. There is no battery unless the action of the defendant was voluntary, or the result of negligence, or of the doing of something forbidden by law. No man when doing that which is lawful is liable for consequences which he could not prevent by prudence or care, though another suffer bodily injury thereby. For example: The defendant's horse, upon which the defendant is lawfully riding in the highway, takes a sudden fright, runs away with his rider, and against all the efforts of the defendant to restrain him, runs against and hurts the plaintiff. This is not a battery or other breach of duty.⁴

which, if true, would save him his costs as given by the jury. But the court decided against him, and cut down the costs allowed; thus holding that to throw water upon a person is a battery.

¹ *Weaver v. Ward*, Hob. 134.

² See, also, *Hall v. Fearnley*, 3 Q. B. 919.

³ See *James v. Campbell*, 5 Car. & P. 372, where the defendant, in fighting with another, hit the plaintiff with his fist.

⁴ See *Vinecent v. Stinehour*, 7 Vt. 62, and example cited by Williams, C. J.

And even though the action of the defendant was voluntary (that is, intentional), it will not necessarily constitute a battery. For example: The defendant, walking near the plaintiff, suddenly turns round, and in so doing hits the plaintiff with his elbow. This is not a battery.¹

Nor is there necessarily a battery though (not merely the general action of the defendant, as in the last example, but) the specific act of contact be intentional, for it may have been done in sport; though sport could doubtless be carried to such an extreme as to constitute the act a battery. It is not even a decisive test, always, to inquire whether the act was done against the plaintiff's will. The plaintiff may be engaged in criminal conduct at the time; or he may be lying unconsciously in an exposed condition; or with the best of intentions he may be doing that which the defendant rightly thinks dangerous to life or property. In the first of these cases, an arrest of the plaintiff by laying on of hands will be justifiable; in the second case, an arousing or removal of him will be proper; and, in the third, the laying on of hands to attract his attention is lawful.² In none of these cases is there a battery, though the contact be against the will of the plaintiff.

If, however, the act were done in a *hostile* manner the case would be different;³ and the question whether the act was hostile (probably) furnishes the criterion, when the same was voluntary, and not the result of negligence or other unlawful conduct. In the two latter cases, it matters not, as has already been seen, whether the act was hostile or not.

A battery may also be committed in an endeavor to take one's own property from the wrongful possession of another.

¹ A case put by Martin, B., on the argument in *Coward v. Baddeley*, 4 Hurl. & N. 478. See *Brown v. Kendall*, 6 Cush. 292.

² As to the last case, see *Coward v. Baddeley*, 4 Hurl. & N. 478.

³ *Ib.*

If the party in possession should refuse to surrender the property, the owner must resort to the courts to obtain it, or await an opportunity to get possession of it in a peaceful manner. He has no right to take it out of the hands of the possessor by force. For example: The defendant, finding the plaintiff in wrongful possession of the former's horse, beats the plaintiff, after a demand and refusal to give up the animal, and wrests the horse from the plaintiff's possession. This is a battery.¹

§ 4. OF SON ASSAULT DEMESNE.

If the wrong complained of was the immediate effect of an unlawful act committed by the plaintiff, the defendant *may* not be liable. It is not, however, every unlawful act that will justify a battery or an assault. It is unlawful to refuse to perform a contract according to its tenor; but such an act will not justify the injured party in committing an assault or a battery upon the other. It is unlawful, too, to make an entry upon the lands of another without permission; but the doing so will not justify the occupant of the premises in unnecessarily doing bodily harm to the trespasser.²

There are however a few cases in which a man is entitled to take the law into his own hands and inflict corporal injury upon another. Among these are to be noticed the right of a parent to give moderate correction to his minor child; the (probable) right of a guardian to do the like to a minor ward; the right of a schoolmaster (when not prohibited by law or school ordinance) to do the like to his scholars; the (possible) right of a master to do the like to young servants; and the right of officers of reform, dis-

¹ *Andre v. Johnson*, 6 Blackf. 375. See *Suggs v. Anderson*, 12 Ga. 461. But the defendant could keep his horse. *Scribner v. Beach*, 4 Denio, 448, 451.

² *Bird v. Holbrook*, 4 Bing. 628.

cipline, or correction, to do the like towards the refractory who have been committed to their charge.

Aside from cases of one of these classes, the right to do that which would otherwise amount to an assault or a battery is confined to two or three cases, all of which are included under the term *son assault demesne*. This is an old law-French expression, signifying that the assault or battery alleged by the plaintiff was his own act, or rather was the effect of his own act. A person cannot be liable for an act which he himself has not committed or caused, either personally or by another authorized to act for him. Hence if the plaintiff himself caused the act complained of, the defendant cannot be liable to him for it.

The first case to be noticed in which the justification of *son assault demesne* is allowed, is where the plaintiff himself began an attack upon the defendant. The right of self-defence is sanctioned as well by the municipal law as by the law of nature. And the right extends to the use of physical force in the protection of property as well as of the person of the defendant, provided the property be at the time in the defendant's possession. No one has a right, except under authority of law, to seize upon property of which the owner is in possession, and he does so at the risk of sustaining bodily violence in the act. For example: The plaintiff, a creditor of the defendant, seizes the defendant's horses (which the latter is using) for the purpose of obtaining satisfaction of his debt. The defendant resists and strikes the plaintiff. He is not liable if he did not exceed the bounds of defence.¹

If the owner or person entitled to possession was out of possession at the time of committing the alleged assault or battery, he will not be permitted to say, by way of defence, that the plaintiff caused the assault by having previously

¹ See *Cluff v. Mutual Ben. Life Ins. Co.*, 13 Allen, 308; s. c. 99 Mass. 317.

taken wrongful possession, or by having wrongfully detained, the defendant's property. Such is not a case of *son assault demesne*, as the example already given of the horse taken from the plaintiff's possession by violence shows.¹

And though a trespasser should make an assault upon the owner of property, and seek to take it out of the owner's possession, the owner is allowed to use no greater force in resisting the unlawful act than may be necessary for the defence of his possession.² If he should reply to the trespasser's attempt with a force disproportionate to the provocation, the act will then be his own battery, and not the plaintiff's; or in the technical language of pleading, the plaintiff can then reply to the defendant's plea of *son assault demesne*, that the tort was *de injuria sua propria*, — the defendant's own wrong. For example: The defendant, owner of a rake which is in his own hands, knocks the plaintiff down with his fist, upon the plaintiff's taking hold of the rake to get possession of it. The defendant is liable.³ Again: The defendant strikes the plaintiff repeated blows, knocking her down several times, upon her refusal to quit the defendant's house. The plaintiff is entitled to recover.⁴

Nor is it lawful for the owner of property, in defence of his possession, to make an attack upon the trespasser without first calling upon him to desist from his unlawful purpose, unless the trespasser is at the time exercising violence. In the example last given, the defendant would have been liable for a mere hostile touch had he not first requested the plaintiff to leave his premises; unless she had entered his premises with force.⁵

¹ *Ante*, p. 105.

² The allowable force in such a case is expressed by the words of the old pleading *molliter manus imposuit*, — the defendant gently laid his hands upon the plaintiff.

³ *Scribner v. Beach*, 4 Denio, 448.

⁴ *Gregory v. Hill*, 8 T. R. 299.

⁵ See *Scribner v. Beach*, *supra*.

In the next place, it is to be observed that a person may not only exercise a reasonable degree of defence to his own person, and to the possession of his own property, but he may do the same towards the members of his own family when attacked;¹ and perhaps also towards the inmates of a house at which he is then receiving hospitality. Certain it is, that a servant may justify a battery as committed in defence of his master;² that is, he may do any thing in his master's defence which his master himself might do. And, on the other hand, notwithstanding some doubts in the books, a master may justify a battery as committed in defence of his servant. For example: The plaintiff attacks the defendant's servant, whereupon the defendant assists his servant to the extent of repelling the attack, and no further. The defendant is not liable.³

A person may also justify the use of a proper amount of physical force as rendered in quelling a riot or affray at the instance of a constable or other officer of the peace,⁴ or perhaps of his own motion, when no officer is present.

§ 5. OF VIOLENCE TO OR TOWARDS ONE'S SERVANTS OR ASSISTANTS.

It will have been observed that a double breach of duty may be committed by the same assault or battery; one to the immediate person to whom the violence is done, and where such person is a servant or assistant (including child, husband, or wife), another breach to the person whom he or she was serving or assisting. It follows that each has a right of action against the wrong-doer in respect of the breach of his own individual right; the servant or assistant for the violence (that is, for the assault or battery), and

¹ 1 Black. Com. 429.

² Reeve, Domestic Rel. 538 (3d ed.).

³ Tickell v. Read, Lofft, 215.

⁴ Year Book, 19 Hen. 6, pp. 43, 56; Bigelow's L. C. Torts, 270.

its proper consequences, and the master (including parent, husband, or wife), for the loss of service or assistance.

There will be this difference, however, between the rights of action of the master and the servant (using these terms generically), that the latter will be entitled to recover judgment for the mere assault and battery, though no damage were actually inflicted; while the former will be entitled to judgment only in case he can prove either (1) that the violence committed was such as to disable the person who sustained it from rendering the amount of aid which he or she was able to render before the act complained of; or (2) that such person was, by reason of the violence, caused to depart from or abandon the service or abode of the plaintiff.¹ That is, the master must have sustained an actual damage;² but, if he has thus been injured, he is entitled to recover therefor, even though the defendant's act consisted only in violent demonstrations. For example: The defendants, by menaces and angry demonstrations against the plaintiff's servants, shoemakers, cause them to leave and abandon the plaintiff's service. The defendants are liable; though no bodily violence was committed upon the servants.³

In regard to the master's right of action, it matters not how slight the services may be which the servant could render: if he could render any, and has been disabled or driven away, the master's rights have been violated, and the wrong-doer is liable to him. For example: The de-

¹ The authorities upon this subject are mostly ancient, but they are still law. See Bigelow's L. C. Torts, 226, 227.

² In the case of an assault or battery upon one's wife, the husband at common law joined in the action; but the real *right* of action lay in the wife. And, in times of servitude, the master could perhaps sue for an assault or battery committed upon his villein, even though the former sustained no damage. L. C. Torts, 227.

³ Year Book, 20 Hen. 7, p. 5, stated in Bigelow's L. C. Torts, 226; and compare *Walker v. Cronin*, 107 Mass. 555.

fendant commits an assault and battery upon the plaintiff's daughter, and disables her from serving at the head of his table, as she has been accustomed to do. The plaintiff is entitled to recover for the loss of service.¹

The plaintiff must, however, either have been entitled to require the services of the party assaulted or beaten, or he must have been in the actual enjoyment of them, if they were gratuitous. A parent cannot maintain an action for an assault or a battery committed upon his child after the child's majority, unless he or she was then actually in the parent's service; nor could the parent maintain an action for such an injury committed upon his child during the child's minority, if the parent had in any way divested himself of the right to require his child's services.²

It is laid down that only the parties to a contract (and their successors in right) can maintain an action for a breach thereof; and hence that if, in the course of performing a contract made with a servant, the other party thereto commit a battery upon the servant, which battery is a breach of the terms of the contract, the master has no right of action for his loss of service. For example: The defendants, common carriers of passengers, are paid by the plaintiff's servant for safe passage from A to B. On the way, the servant is severely bruised, wounded, and injured by reason of the failure of the defendants to carry him safely according to their agreement; and the plaintiff thereby loses the injured person's service for a period of nineteen weeks. The plaintiff is deemed not entitled to

¹ The following cases, though actions for seduction, will justify this example: *Bennett v. Allcott*, 2 T. R. 166; *Maunder v. Venn*, *Moody & M.* 323; *Thompson v. Ross*, 5 Hurl. & N. 16.

² Questions of this sort have generally arisen in actions for seduction; and, since the subject must be elsewhere fully examined, it need not be further pursued at present. See Chapter 7.

recover ; the injury being the result of a breach of contract with the servant.¹

The reason on which this doctrine rests is technical in the extreme, and its soundness is questionable. The effect of it is, that, by entering into a contract with a third person, a party can throw off the duty which he previously owed to another, without the latter's consent. Besides, if the existence of the contract were a sound objection to the action by the master in such a case as that stated, it would follow that the master would be in a worse condition when his servant paid his fare, than he would be if the carrier had invited the servant to go the journey with him *gratis* ; for, no contract having been made with the servant, the carrier's duty to the master would continue.

It may, however, be doubted if there can be a breach of duty of this kind, if of any kind, when the wrong-doer has no notice of the existence of the right alleged to have been violated. The duty to a master should depend upon notice that the person beaten is a servant. A person is bound for the consequences of his acts only in so far as he could foresee their effects as reached in the natural and usual course of things. Such consequences he is said to intend ; and, intending them, he is liable for them. Further than this, his liability cannot, according to established principles of law, be carried. Upon this ground, therefore, the carrier, in the example given, would not be liable ; supposing him not to have notice of the plaintiff's rights.²

¹ *Alton v. Midland Ry.* 19 Com. B. N. S. 213 ; s. c. 15 Jur. N. S. 672 ; *Fairmount Ry. Co. v. Stutler*, 54 Penn. St. 375.

² It is true, the precedents of declarations by the master contain no allegation of notice of his rights on the part of the defendant ; but it is to be observed that the precedents given in the books, and nearly all of the cases, are such as to show that the defendant in fact had such notice. The defendant is alleged to have assaulted a child, or to have menaced and driven away a servant from the performance of his services. Hence the omission of the allegation is

By the common law, rights of civil action for injuries done to the person (and indeed all rights of action *ex delicto*, excepting for the wrongful taking or detention of property) cease with the death of the party injured.¹ It is accordingly laid down in the old books that if a servant or assistant (including a child, wife, or husband) were so beaten that he died, the master (using this term generically) had no right of action against the wrong-doer. This, however, is not now universally considered to be the law. The rule that the action dies with the death of the injured party² permits at all events an action by the master for damages between the time of the injury of the servant and his death, where death was not immediate; and recent authority has gone still further.³ It may be added that statutes have been quite generally passed granting a right of action to the next immediate kin of the deceased.

not inconsistent with the suggestion, *supra*. It is worthy of mention that in actions for enticing away servants, *per quod servitium amisit magister*, it is necessary for the plaintiff to allege notice of the relation of master and servant. See *Blake v. Lanyon*, 6 T. R. 221; *post*, Ch. 7, § 2.

¹ Or of the wrong-doer.

² *Actio personalis moritur cum persona*.

³ *Sullivan v. Union Pacific R. Co.*, 1 Cent. L. J. 595, where a father was held entitled to recover for the death of his minor child, with damages for his loss of service until the child would have attained his majority. The cases, English and American, are there reviewed. See also 2 Southern Law Rev. N. S. 186.

CHAPTER VI.

FALSE IMPRISONMENT.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty to forbear to impose without authority of law, and against his will, a total restraint upon his freedom of locomotion.

OBSERVATIONS.

1. The terms "writ," "warrant," "precept," and "process," are, in this chapter, used synonymously.

2. The term "irregular," as applied to a writ, refers to some improper practice on the part of the person who obtains the writ. But inasmuch as a writ is sometimes absolutely void for irregularity,¹ and sometimes only voidable, and the result is to make two sets of rules of law with regard to irregular writs; and especially because the term is sometimes loosely applied in the books,—its use will here be omitted as far as possible.

3. By the term "mesne process" is meant all process that issues in the course of the conduct of a cause between the primary process with which the suit begins and the final process with which it ends.

§ 2. OF THE NATURE OF THE RESTRAINT.

A false imprisonment consists in the total, or substantially total, restraint of a man's freedom of locomotion, without authority of law, and against his will. Such an

¹ As a writ in execution of a judgment which has been discharged to the knowledge of the person suing out the same. *Deyo v. Van Valkenburgh*, 5 Hill, 242.

act may be committed not only by placing a man within prison walls, but also by restraint imposed upon him in his own house or room, or in the highway, or even in an open field.¹

Any general restraint is sufficient to constitute an imprisonment; and though this be effected without actual contact of the person, it will be actionable if unlawful. Any demonstration of physical violence which, to all appearance, can be avoided only by submission, operates as effectually to constitute an imprisonment, if submitted to, as if contact and force had been exercised. For example: The defendant says to the plaintiff, "I want you to go along with me," with a show of authority or of determination to compel the plaintiff to go. This is an imprisonment, though the defendant do not touch the plaintiff.²

A person may also be imprisoned, though he had not the full power of locomotion before the restraint was imposed. It appears to be sufficient if his will has been so overcome that he would not attempt to escape the restraint if he had the physical ability of locomotion. For example: The defendant, a creditor of the plaintiff, goes with an officer to the plaintiff's house, in order to compel him to give security or satisfaction of his debt, which was not due. The plaintiff is found sick in bed; whereupon the officer tells him that they have not come to take him, but to get a certain article of property belonging to the plaintiff, though, if he will not deliver that or give security, they must take him or leave some one in charge of him. The plaintiff, much alarmed, gives up the article. This is an imprisonment.³

¹ Lib. Ass. (22 Edw. 3), p. 104, pl. 85, a very old case, but good law.

² *Brushaher v. Stegeman*, 22 Mich. 266.

³ *Grainger v. Hill*, 4 Bing. N. C. 212.

The submission, therefore, to the threatened and reasonably apprehended use of force is not to be considered as a consent to the restraint.¹ And the imprisonment continues until the party is allowed to go where he pleases, and is involuntary until all effort at restraint ceases, and the means of effecting it are removed.²

It is not enough that restraint is imposed upon one's freedom of proceeding in a particular desired direction. The detention must be such as to cause escape in any direction to amount to a breach of the restraint; except, perhaps, where the only avenue of escape not guarded is an almost impassable one. For example: The defendant, an officer, stationed at a particular point to prevent persons from passing in a certain direction, restrains the plaintiff from passing that way, but leaves another way open to him, of which, however, he does not wish to avail himself; and, thus detained, the plaintiff stands there for some time. This is not an imprisonment.³

It follows from the last proposition, and from what had been stated before, that a person detained within walls is none the less imprisoned by reason of the fact that he may make an escape through an unfastened window or door; since such an act would be a breach of the restraint. If it would not be, there is no imprisonment; supposing that the unfastened door or window affords a ready means of escape.

§ 3. OF ARRESTS WITH WARRANT.

Supposing the restraint imposed to amount to an imprisonment, it is to be noticed that the imprisonment must be a false one, that is, it must be an illegal restraint of free-

¹ Within the maxim *volenti non fit injuria*.

² *Johnson v. Tompkins*, Baldw. 601.

³ *Bird v. Jones*, 7 Q. B. 742.

dom, in order to constitute it a breach of duty. Under what circumstances, then, is an imprisonment illegal?

Not to attempt to give all possible special answers to this question, it may be comprehensively said that the restraint is lawful (1) whenever expressly commanded by due authority of law, and (2) whenever impliedly commanded or authorized by law.

The most common illustration of an imprisonment of the first kind is where a person has been arrested by an officer of the law under a warrant issued from a competent judicial tribunal. The arrest in such a case, though the writ was erroneously issued, is a justification, since it was made under a command which the officer has no right to disobey. In England, this justification of the officer is founded on statutory law;¹ but the statute was passed before the American revolution, and is perhaps in force in this country. At all events, the American law conforms to its provisions. By the old common law, an officer who executed the warrant of a magistrate, such as a justice of the peace, was, it is said, answerable for the consequences in all cases, if the magistrate acted without authority. The Act of Parliament referred to was passed to relieve him from that hardship, and to provide that, except in cases to be mentioned, if he acted strictly in obedience to the warrant, he should be protected.

Before proceeding to consider the effect of an arrest upon a warrant improperly granted, it is to be observed that (supposing the writ to have been properly issued) the officer, in executing his precept, must arrest the person named in it. If he do not, though the arrest of the wrong person was made through pure mistake, it is a case of false imprisonment. And this appears to be true, though the party arrested bear the same name as the party against whom the writ is directed. For example: The defendant,

¹ 24 Geo. 2, c. 44.

a constable, asks the plaintiff if his name is J. D., to which the plaintiff replies in the affirmative; whereupon the defendant takes the plaintiff into custody, the plaintiff not being the person intended by the writ. This is a case of false imprisonment.¹

If, however, the plaintiff, though not the person intended by the writ, should intentionally do any thing to mislead the officer, and cause the latter to believe that the former was the person meant by the precept, the officer commits no breach of duty in making the arrest. The plaintiff's action is a consent, and something more. For example: The defendant, a sheriff, arrests the plaintiff under process of court, upon a representation made by her that she was E. M. D., and the person against whom the writ had issued; with the intention of procuring the defendant to arrest her under his writ. The defendant, believing the representation to be true, makes the arrest. This is not a breach of duty.²

The officer's writ, however, should so describe the person to be arrested that he may know whom to arrest; or, rather, that a person whom he proposes to arrest may know whether to resist or submit. If the warrant be defective in this particular, the officer acts at his peril in serving it; and he will be liable to any one whom he may arrest under it. For example: The defendant, a constable, arrests the plaintiff under a writ reciting the commission of a felony by John R. M., and then commanding the officer to arrest the said *William M.* The defendant is liable for false imprisonment, though the plaintiff is the person intended.³

¹ *Coote v. Lighworth*, F. Moore, 457. It is to be noticed that the plaintiff in this case did nothing to induce the officer to arrest him as the person intended.

² *Dunston v. Paterson*, 2 Com. B. n. s. 495. The sheriff, however, had detained the plaintiff improperly after discovering his mistake, and for this he was held liable.

³ *Miller v. Foley*, 28 Barb. 630.

It follows that the officer may be liable if there be a misnomer in the warrant of the person intended, though the person actually meant was arrested, and that, too, (in other respects) on legal grounds. For example: The defendants cause the plaintiff, whose name is Eveline, to be arrested under the name of Emeline in the warrant. This is a breach of duty, though the plaintiff, in her proper name, was legally liable to such an arrest.¹ But the case would have been different had the plaintiff been known alike by either name.²

The officer also loses the protection of his precept if he fail to act in accordance with the duty enjoined by it. He must follow the tenor of his writ, and not surpass his authority. For example: The defendant arrests the plaintiff beyond the precincts named in the writ. This is a false imprisonment.³

It is further to be noticed that, though the writ and arrest be valid, the protection of the officer may be lost by oppressive or cruel conduct. For example: The defendant, charged with a writ simply to take the body of the plaintiff, unites with the person at whose instance the arrest is made in illegally extorting money from the plaintiff, by working upon his fears. The defendant is liable for a false imprisonment.⁴

The officer's protection may also be lost by a detention after the warrant has expired. The warrant, however valid at first, will not justify such an act. If the officer have reason for holding the prisoner after the expiration of the warrant, he must procure a new writ. He can hold the prisoner only for a reasonable time before his examina-

¹ *Scott v. White*, 4 Wend. 555.

² *Griswold v. Sedgwick*, 1 Wend. 126.

³ This is too fundamental to have been much agitated in the courts. No authority is needed for the example.

⁴ *Holley v. Mix*, 3 Wend. 350.

tion : after that time, the warrant (that is, the original warrant of arrest) loses its vitality. For example : The defendant arrests the plaintiff, and takes him before a magistrate on a charge of larceny, detaining him for a period of three days, in order that the party whose goods had been stolen might have an opportunity to collect his witnesses and prove the crime. This is a false imprisonment, the detention being unreasonable.¹

When an arrest has been made upon a valid writ, the officer may detain the prisoner on any number of other valid writs which he has at the time, or which may afterwards, during the detention, reach him. But if the officer make the arrest on a void writ, or in an otherwise illegal manner, he has no right to detain the party on any valid writ which may be in his hands ; for the officer, upon a principle elsewhere stated, cannot avail himself of a custody effected by illegal means to execute valid process.² The prisoner should first be permitted to go at large, and then arrested under the valid writ. For example : The defendant improperly arrests the plaintiff without a warrant, and while holding him in custody delivers him to an officer. The defendant afterwards receives a valid writ for the plaintiff's arrest from an officer who held it at the time of the arrest. The plaintiff has a right of action for a false imprisonment.³

The principle to be derived from the cases (to restate this important doctrine in the language of the courts⁴) is, then, that where the officer legally arrests the party in one action, the arrest operates virtually as an arrest in all the actions

¹ *Wright v. Court*, 4 Barn. & C. 596. The prisoner should have been taken before a magistrate at once.

² *Hooper v. Lane*, 6 H. L. Cas. 443.

³ *Barratt v. Price*, 9 Bing. 566.

⁴ *Tindall, C. J.*, in *Barratt v. Price*, and *Williams, J.*, in *Hooper v. Lane*, *supra*.

in which the officer holds writs against him at the time; for it would be an idle and useless ceremony to arrest the party in the other cases. And this detainer will hold good, though the court may, upon collateral grounds, unconnected with the act of the officer, order the party to be discharged from the first arrest. But where the officer has illegally arrested the party, he is not in custody under the first writ, but is suffering a false imprisonment; and such false imprisonment, being no arrest in the original action, cannot operate as an arrest under the other writs in the officer's hands.

It is important, in the next place, to inquire into the right of an officer to retake a prisoner under the original warrant, after an escape. It is clear that if the escape was made without the consent of the officer, while the writ was still in force, the prisoner may be retaken on the old precept, without rendering the officer liable to an action for false imprisonment. In case of an escape permitted by the officer, his right of retaking on the old writ will depend on the nature of the case. In civil cases, an officer who has arrested a man on mesne process may retake him before the return of the writ, though he voluntarily permitted him to escape immediately after the arrest. For example: The defendant arrests the plaintiff in civil process, and on the following day releases him upon the latter's request. Two days afterwards, the defendant rearrests the plaintiff on the old writ and commits him to jail, where he remains until he gives bail; the old process not being yet returnable (that is, being still in force). This is not a breach of duty on the part of the officer.¹

If the arrest, however, in the example last given had been made on execution, and not on mesne process, the effect of permitting an escape would have been different. The officer could not in such a case re-arrest the prisoner.

¹ *Atkinson v. Matteson*, 2 T. R. 172.

The reason of the difference is this: If the prisoner, taken on execution, escape by the voluntary permission of the officer in charge of him, the debt of the plaintiff in the action is considered to be paid, so that there is no further ground for putting the party under restraint. But, in the case of an escape on mesne process, the officer need only have the prisoner before the court at the return of the writ.¹

In regard to criminal cases, there has been some conflict of authority as to the right to take the prisoner without new process. It has sometimes been decided that the prisoner may be so retaken.² In later decisions, this doctrine has been denied to be law, except in so far as it may apply to the case of a prisoner who, after escape, has returned and given himself into custody of the officer: in this case the prisoner can be detained under the old writ.³ And this appears to be the true rule and distinction. For example: The defendant, an officer of the peace, charged with a warrant to arrest the plaintiff upon a charge of larceny, executes the writ upon her, and takes her before a justice of the peace, who receives her recognizance to appear for trial at another court upon a certain day. She is then discharged from arrest. No court is held at the place and time stated. Afterwards the defendant re-arrests her upon the old warrant, and takes her before another magistrate. This is a false imprisonment.⁴

An arrest made under a void writ will generally render

¹ *Ib.* It should be observed, however, that imprisonment on execution for debt has been quite generally abolished.

² *Clark v. Cleveland*, 6 Hill, 344. In this case, the prisoner had been let to bail in the wrong county, and then released from custody; and, in an action by him for malicious prosecution, it was held that the plaintiff was still liable to arrest under the original warrant, and that, therefore, the proceedings not being terminated, the action could not be maintained.

³ *Doyle v. Russell*, 30 Barb. 300.

⁴ *Ib.*

the officer, as has already been stated, liable to an action for false imprisonment. But in order to subject him to such liability, the writ must have been actually void; that is, of no more validity than waste paper. If it be voidable merely, or if, though void, the fact do not appear on the face of the writ, the precept affords a protection to the person who serves it.¹

Now a writ will be void (1) if it be materially defective in language; an example of which may be seen in the case above stated, where the writ failed to show who was intended by the precept.

A writ will be void (2) if the whole proceeding in which it was issued was beyond the jurisdiction of the court granting it. For example: The defendant executes a warrant against the plaintiff for the collection of road taxes; the warrant being issued by a justice of the peace who has no authority over such taxes. The writ is void, and the defendant is liable for false imprisonment.²

A writ will be void (3) where the court, though having jurisdiction over the subject-matter of a proceeding, has no authority to institute it by a warrant. For example: The defendant, an officer, executes a warrant for the arrest of the plaintiff in a complaint for the non-payment of wages. The court issuing the writ has jurisdiction over such cases, but has no power to issue a warrant; a summons being the only process allowed. The writ is void, and the defendant is liable.³

In all of these cases, the writ is said to show its invalidity upon its face, and when this is the case the officer is not bound to serve it. The effect of the second and third of these rules is to require the officer to know the general extent of the jurisdiction of the court which he is serving.

¹ *Deyo v. Van Valkenburgh*, 5 Hill, 242.

² *Stephens v. Wilkins*, 6 Barr, 260.

³ *Shergold v. Holloway*, 2 Strange, 1002.

Further than this, the law does not go ; and in other cases the officer will be protected, though his writ were voidable, and liable to be set aside for error, or even though it were actually void.¹ Cases of this kind are always within the limits of the court's general jurisdiction ; and the officer is not liable, since, though bound to know the extent of the court's jurisdiction, he is not presumed to know the nature and propriety of all the proceedings in a cause. If his writ do not indicate its invalidity on its face, the officer is safe, though the writ ought not to have issued.

To put the case in the form of a more general proposition, a ministerial officer is protected in the execution of process, whether the same issue from a court of limited or of general jurisdiction, though such court have not in fact authority in the particular instance, provided that on the face of the process it appears that the court has jurisdiction of the subject-matter, and nothing appears therein to apprise the officer that the court has not authority to arrest the body of the party named in the process. For example : The defendant, a constable, arrests the plaintiff under a warrant from a justice of the peace issued upon a judgment against the plaintiff in an action within the jurisdiction of the court. The court has authority in such cases to issue a warrant, but in this particular instance the suit has not been instituted by the issuance of the necessary process for the appearance of the then defendant, now plaintiff. The defendant has violated no duty to the plaintiff, and is not liable, though the court had no authority to issue the warrant under such circumstances, the writ not indicating the fact.² Again : The defendant, an officer, arrests the plaintiff, a member of the legislature, privileged at the time from arrest, the writ not indicating

¹ See *Deyo v. Van Valkenburgh*, 5 Hill, 242.

² *Savacool v. Boughton*, 5 Wend. 170 ; s. c. *Bigelow's L. C. Torts*, 241.

the fact. This, as to the defendant, is not a false imprisonment.¹

The clerk of the court (probably) will also, like the officer who serves the precept, be liable in case he make out the writ in a defective form. He has done that which he has no right to do, and is impliedly forbidden to do; and he must therefore stand upon the same footing with the officer.

The clerk may also be liable when the officer who serves the writ is not liable. And this will be the case whenever the writ, though regular on its face (and hence a justification to the officer), was issued without orders of the court, under circumstances in which such issuance is not by law allowed. For example: The defendant, clerk of an inferior court, issues a writ of *capias* on which the plaintiff is arrested, without the presence or intervention of the court, upon a default of the plaintiff, as to the granting of which the law requires that the judge should exercise certain judicial functions. The defendant is guilty of a breach of duty, and is liable to the plaintiff; and this too though he only conformed to the usual practice of the court in such cases, since a court cannot delegate to another its judicial functions.²

The clerk will also (probably) be liable, like both the officer and the judge, when the writ, issued by order of the court, shows upon its face that the whole cause was without the jurisdiction of the judge. It will be different, however, if the proceeding, being within the jurisdiction of the court, the particular act merely, commanded by the court, was in excess of its jurisdiction, without the clerk's knowledge. The clerk is a merely ministerial officer, like the sheriff or constable, and is no more bound than such officer to know of the legality of orders of the court within

¹ *Tarlton v. Fisher*, 2 Doug. 671; *Chase v. Fish*, 16 Maine, 132.

² *Andrews v. Morris*, 1 Q. B. 3.

its jurisdiction. For example: The defendant, clerk of a county court, by order of the judge signs and seals a writ for the arrest and imprisonment of the plaintiff for a period of thirty days, after a certain date, upon failure to conform to an order of court; when the order of commitment should have required an earlier arrest. The defendant is not liable, though the judge (as will be seen) would be.¹

The judge is liable whenever the officer, acting in strict accordance with his precept, is liable; provided the precept be not void for defective language. As the judge does not make out the writ, he cannot be liable for such defect; and the clerk is not his agent or servant.² In other cases, that is, when the court has not jurisdiction of the cause, the proceeding is *coram non judice*: the court loses its judicial function, and the judge becomes a mere private citizen.³

But more than this: The judge may be liable when the officer is not. This will be true whenever the judge has plainly exceeded his jurisdiction, though in a matter not affecting the officer. For example: The defendant, a justice of the peace, fines the plaintiff under the game laws, as he may do, and then sends him to jail without any attempt to levy the penalty upon his goods, which he has no right to do. He is liable for false imprisonment; though the officer who executes the writ is not.⁴

¹ *Dews v. Riley*, 11 Com. B. 434.

² *Carratt v. Morley*, 1 Q. B. 18.

³ *The Marshalsea*, 10 Coke, 68 b; s. c. *Bigelow's L. C. Torts*, 278, note.

⁴ *Hill v. Bateman*, 2 Strange, 110. The arrest was justifiable, so far as the sheriff was concerned, because, though in the particular instance unauthorized, it was still within the powers of the justice to grant such a writ in a proper case; that is, after an ineffectual attempt to levy the penalty upon the party's goods. The officer was not bound to know whether such an attempt had been made. Probably he would have been liable had he known that no such attempt had been made; and this knowledge might perhaps have been easily proved. But, until proved, the officer could not be liable.

When the question of the court's jurisdiction turns on matter of fact, it is laid down as well settled that a judge of a court of record with limited jurisdiction, or a justice of the peace acting judicially, with special and limited authority, is not liable to an action of trespass (of which the action for false imprisonment is an example) for acting without jurisdiction, unless he had the knowledge or means of knowledge, of which he ought to have availed himself, of that which constitutes the defect of jurisdiction.¹ And it lies upon the plaintiff in every case to prove the fact.² For example: The defendant, a justice of the peace, having jurisdiction to grant a *capias* in certain classes of civil offences, committed within his district, orders the arrest of the plaintiff, on suit brought against him by a third person, for an offence committed without his district. The defendant, however, has no knowledge that the act was committed beyond his district, nor is he put upon notice of the fact by any thing arising before the arrest. He is not liable for a false imprisonment,³ unless he acted maliciously and without probable cause.⁴

When, however, the question of jurisdiction does not depend upon the proof of certain facts, but upon a question of law, the judge acts at his peril; and, if he order the arrest of an individual when he has no jurisdiction,

¹ *Calder v. Halkett*, 3 Moore, P. C. 28, Parke, B.; *Pease v. Chaytor*, 32 Law J. Mag. Cas. 121, Blackburn, J.

² *Calder v. Halkett* and *Pease v. Chaytor*, *supra*, in which *Carrett v. Morley*, 1 Q. B. 18, apparently *contra*, is doubted.

³ See *Pease v. Chaytor*, *supra*, opinion of Blackburn, J., at pp. 125, 126, from which this example is framed. Another example may be seen in *Lowther v. Radnor*, 8 East, 113, 119. A distinction must, however, be noticed (which was pointed out in *Pease v. Chaytor*) between a proceeding to prevent the enforcement of a judgment in such a case—that would be proper—and an action against the judge of the court, as in the example.

⁴ *Ib.* But the case would then be an action for malicious prosecution.

not determinable on facts, he will be liable for false imprisonment. For example: The defendant, judge of a court of record of limited jurisdiction, directs the arrest of the plaintiff for contempt of the process of the court, and commits him to jail. The commitment is unauthorized, and is made under a mistake of law as to the powers of the defendant, and not under mistake as to the facts; the statute requiring that the process (under the circumstances) should have been issued by the court of another county. The defendant is liable.¹

From the statement of the foregoing principles and examples, it will be seen (1) that the officer alone may be liable for false imprisonment; as where he executes his writ upon the wrong person, without the latter's fault: (2) that the clerk alone may be liable; as where, without direction from the judge, he issues a precept regular in form, and within the jurisdiction of the court, but which he had no right thus to issue: (3) that the judge alone may be liable; as where, having jurisdiction over the cause, he orders the issuance of the warrant under circumstances in which the act was improper: (4) that the officer and the clerk may alone be liable; as where the writ contains substantially defective language: (5) that all three may be liable; as where the whole cause, in the course of which the writ is issued (at the command of the judge), is without the jurisdiction of the court. There appears to be no case in which the clerk and the judge, or the officer and the judge, may alone be liable; and this arises from the fact that the judge occupies a position (that is, a judicial position) entirely distinct from that of the clerk and the officer; while they occupy the like position towards each other of ministerial servants.

This is not all. The liability for a false imprisonment may extend to the attorney at whose instance the proceed-

¹ *Houlden v. Smith*, 14 Q. B. 841.

ing was begun, and, further still, to his client who authorized him to begin it. Indeed, this will always be the case wherever it can be properly said that the imprisonment was *ordered* by the client, after the warrant, being voidable and not void, has been set aside as illegal.

When the judge assumes the power of ordering the warrant, upon a full statement of the grounds, the act (with the exception to be stated presently) is his own, and not the attorney's or his client's;¹ and this, too, though counsel were urgent for the issuance of the writ.² If this be the extent of the connection of the attorney and client with the arrest, neither can be liable, whether the writ was granted upon a mistaken view of the law by the judge as to his jurisdiction (in which case *he* would be liable), or was issued in a materially defective form (in which case the clerk and the officer would be liable): the act is that of another. Illustrations may be seen in the examples above given. Hence the attorney and client may not be liable, though the process was void on its face.³

The attorney, and his client with him, may, however, become liable in a case in which the arrest has been thus ordered by the judge. Such a result will come about whenever the attorney participates in any manner in effecting the arrest after the issuance of the improper warrant. For example: The defendants, attorney and client in a former

¹ Carratt v. Morley, 1 Q. B. 18; Williams v. Smith, 14 Com. B. n. s. 596; Smith v. Sydney, Law R. 5 Q. B. 203.

² Cooper v. Harding, 7 Q. B. 928. See Peckham v. Tomlinson, 6 Barb. 253.

³ Carratt v. Morley, 1 Q. B. 18. The author withdraws his criticism on this case, made in his Leading Cases on Torts, p. 280. The client had done nothing but to ask for a writ; and the court, acting judicially, granted it. The act was, therefore, the act of the judge, and not of the party. The latter, to be liable, must either have directed the execution of the writ after its issuance, or have obtained it from the court in an irregular manner.

litigation against the present plaintiff, having obtained an erroneous warrant against the latter from the judge, the attorney personally puts the precept into the officer's hands, and directs him to serve it. The defendants are both liable; the attorney because of his personal interference; the client because bound by the act of his attorney in the ordinary course of the litigation.¹ Again: The defendant, an attorney, indorses with his name and residence an invalid warrant, issued against the plaintiff. This makes him a participant in the false imprisonment which follows;² and his client also.

When the writ of arrest is issued through misconduct of the attorney, or materially false representations even though not fraudulent, or even through his mistake, the act is not the act of the judge, unless he had no jurisdiction to grant the writ, but of the attorney, and of his client whom he represents.³ The consequence is, that the last named are both liable for false imprisonment upon the execution of the precept; even though they take no further steps in the matter than those involved in obtaining the writ.⁴ For example: The defendants, attorney and client in a former suit against the present plaintiff, obtain a warrant therein for the latter's arrest upon material misrepresentations made in an affidavit upon which the warrant is awarded, on account of which misrepresentations the warrant is,

¹ *Barker v. Braham*, 2 W. Black. 866; s. c. *Bigelow's L. C. Torts*, 235.

² *Green v. Elgie*, 5 Q. B. 99.

³ *Williams v. Smith*, 14 Com. B. N. s. 596; *Codrington v. Lloyd*, 8 Ad. & E. 449; *Collett v. Foster*, 2 Hurl. & N. 356. See *Davies v. Jenkins*, 11 Mees. & W. 745. *Contra*, *Coupal v. Ward*, 106 Mass. 289.

⁴ This is what is meant when it is said that the attorney and his client are liable in case of irregularity in obtaining the writ. Irregularity (in this sense) is the act of the party and not of the court. See *Codrington v. Lloyd*, 8 Ad. & E. 449. But see *Johnson v. Maxon*, 23 Mich. 129.

after the plaintiff's arrest, set aside. They are both liable.¹ Again: The defendant, by his attorney, in a former suit against the now plaintiff, procures the arrest therein of the last named under a writ issued by mistake against a person not bearing the name of the present plaintiff. This is a false imprisonment, and the defendant is liable, although the person intended was arrested.² Again: The defendants, attorney and client, in a former civil action against the now plaintiff, in which they obtained judgment against him, obtained a warrant for the arrest of the plaintiff by virtue of the judgment, after a discharge therefrom of the plaintiff by proceedings in insolvency, of which the defendants had notice. They are liable for false imprisonment; unless it can be shown that the discharge was obtained by fraud.³

It will thus be seen that there may be cases in which all the parties named will be jointly liable, — client, attorney, officer, clerk, and judge. Such will be the result where the attorney personally directs the officer to serve a writ upon the plaintiff, issued by the judge's order, in a civil cause wholly beyond the jurisdiction of his court.

There is a structural distinction between civil and criminal cases. The parties are different. A civil suit is a litigation between individuals: a criminal suit is a litigation between the State and an individual. The prosecutor

¹ *Williams v. Smith*, 14 Com. B. n. s. 596. The action was not sustained in this second suit because the misrepresentations were not material.

² See *Jarman v. Hooper*, 6 Man. & G. 827.

³ *Deyo v. Van Valkenburgh*, 5 Hill, 242. This is the exception alluded to above, by which the attorney and client are liable, though the judge has been merely asked to grant the warrant. But it was misconduct to ask for the warrant when it was known that the judgment had been discharged, unless proof could be brought that the discharge was fraudulent. The judge, having no jurisdiction to grant the warrant in such a case, would also be liable.

in a criminal action does not represent the plaintiff in a civil suit. A civil proceeding is instituted in the interest and for the benefit of the plaintiff, and is under his control throughout: the plaintiff is *dominus litis*. False steps and misconduct on his behalf in the course of the litigation will therefore bind him, as has already been seen. The prosecutor of crime, however, is not a party to the litigation instituted by him. The proceeding is not carried on primarily in his interest; and he has no control over its course. The consequence is, he cannot be bound by the action of the attorney-general or other prosecuting officer. He may, however, bind himself, and become liable for a false imprisonment by acts of his own, or of counsel whom he may employ to assist the State. If the prosecutor or his attorney should personally direct the service of an invalid writ, whether void or only voidable, he would be liable to the party arrested.¹

Before an action for false imprisonment under process of court can be maintained, it is necessary that the writ should be set aside, unless it appear to be absolutely void. For if the process be merely voidable, it is valid until quashed; and hence the arrest must, till then, be legal.² If, however, the process be absolutely void, and the action be brought against the proper party or parties, it is not necessary, either in cases of civil or in criminal arrests, to have it set aside before suing for false imprisonment. For example: The defendant procures the arrest of the plaintiff on a warrant issued upon a judgment which the former knows to have been discharged; and the plaintiff sues for false imprisonment without first having the writ set aside. The action is maintainable; the writ being absolutely void.³

¹ *Brown v. Chadsey*, 39 Barb. 253; *Hopkins v. Crowe*, 4 Ad. & E. 774.

² See *Deyo v. Van Valkenburgh*, 5 Hill, 242; *Chapman v. Dyett*, 11 Wend. 31.

³ *Deyo v. Van Valkenburgh*, *supra*.

Again : The defendant, a justice of the peace, procures the arrest of the plaintiff upon four convictions before him of baking bread on one and the same Sunday ; the law permitting of but one conviction in such a case. The defendant is liable for false imprisonment, though the wrongful convictions be not first quashed.¹

In both civil and criminal cases, however, the action is to be distinguished from a suit for malicious prosecution. The writ in an action for a false imprisonment, made under process of court, may have been, as to the party or parties sued for the tort, either void or voidable ;² and, in such a case, the action is maintainable without proof of malice, or of want of probable cause, or of the termination of the prosecution. In an action for malicious prosecution, however, it matters not whether the writ was void, voidable, or valid ; but the plaintiff, as has been seen, has the burden of proving all the facts just stated.

§ 4. OF ARRESTS WITHOUT WARRANT.

It is not necessary, however, in all cases that an arrest for an infraction of the law should be made under authority and by command of a warrant. There are occasions on which the utmost promptness of action is required for the attainment of the ends of justice in the apprehension of violators of the law ; and the necessities of society have in such cases furnished a justification for the arrest of offenders without a formal warrant of a court of justice.

¹ *Cripps v. Durden*, 2 Cowp. 640. In this case there was no arrest, but merely a levy on the plaintiff's goods for the amount of the penalty ; but the principle would be the same.

² It will be noticed that to sustain an action against the officer who served the writ, or against the clerk, the writ must have been void on its face ; while it is enough in *this* respect, to sustain an action against the judge or attorney and client, that the writ was only voidable.

But the law does not encourage the making of arrests in this manner: on the contrary, in the interest of liberty, it prefers a slower and more deliberate proceeding by warrant, issued upon solemn oath concerning the facts, in all cases in which the administration of justice can thus be efficiently carried out.

The occasions on which arrests without warrant are considered justifiable upon the above stated ground are well defined. In the first place, it must be understood that the right to make such arrests is confined altogether to infractions of the criminal law (a term which includes misdemeanors as well as technical crimes). In no case can an officer make an arrest in a civil cause without the protection of a warrant. It is true, as has been already stated, that, in cases of the release of a prisoner arrested on mesne process in a civil action, the officer may retake the party without obtaining a special warrant for this particular purpose; but that is because he has already a warrant, which is still in force. Hence, the officer does make the arrest under a writ; and he must justify his act under that writ.

The first case to be mentioned in which an arrest can be made without a warrant, is when the arrest is made upon the spot, at the time of the breach of the peace. Such a case comes directly within the reason above mentioned, namely, the necessities of society; nor could there be any use of requiring an affidavit and warrant in such a case, even if the delay might not be fatal. The right thus to arrest on the spot applies equally to all breaches of the peace, whether the act be a crime or a misdemeanor.

An arrest without warrant may also be made by an officer of the law, qualified for the making of arrests, upon "suspicion of felony," to use a common expression of the books. The meaning of this is, that if in an action for false imprisonment, without warrant (that is, *because without warrant*), the officer can show that, though no felony

was in fact committed, he had reasonable ground to suppose that the prisoner had committed such a crime, he has violated no duty to the plaintiff in thus making the arrest. For example: The defendant, a constable, having reasonable ground to believe that the plaintiff is guilty of the felony of receiving or aiding in the concealment of stolen goods,¹ arrests him without a warrant, and conveys him to jail, where he detains the prisoner until he can make application to a magistrate for a warrant against him as a receiver of stolen goods. The warrant is refused, and the prisoner at once discharged. The defendant is not liable.²

The officer's suspicion must, however, as above explained, be a reasonable ground to suppose the prisoner guilty of a felony; that is, it must be such a strong suspicion as would justify a man of caution in entertaining a belief in the party's guilt. If the circumstances do not warrant such a belief, even though in fact a felony has been committed, the officer violates his duty to the plaintiff by arresting him without process of court.³ For example: The defendant, a constable, arrests and imprisons the plaintiff, without process, under the following circumstances: the cart of the plaintiff, a butcher, is passing along the highway, when a person, in the habit of attending fairs, stops the cart and says to the officer (defendant), "These are my traces, which were stolen at the peace-rejoicing last year." The defendant asks the plaintiff how he came by the traces. The plaintiff replies that he had seen a stranger pick them up in the road, and had bought them of him for a shilling; whereupon he is taken into custody, and, on examination before a magistrate, discharged. This does not show a

¹ Felony by the laws of Massachusetts.

² *Rohan v. Sawin*, 5 Cush. 281.

³ The process would justify the officer in such a case, since the granting of it would be a declaration of the judge that there exists reasonable ground to believe the party guilty.

reasonable ground for the arrest without a warrant, and the defendant is liable.¹

In the authority from which this example is taken, the whole case was given to the judges, with power to act as a jury so far as might be necessary for the decision of the question before them. It therefore does not appear from the decision, whether the question of reasonable cause is to be considered as a question of law or as a question of fact; and the point was expressly left undecided by the judges.

The question has, indeed, never been finally answered. In some of the cases, it has been tacitly assumed that the jury must determine whether the officer had reasonable ground for taking the plaintiff into custody;² in others, that it is for the court to say whether the facts proved show proper ground.³ The point has, however, been decided in England in accordance with this latter view;⁴ making the rule to conform to that of actions for malicious prosecution; and this seems to be the true rule.

If the analogy furnished by the law of actions for malicious prosecution is to be fully carried out, and it appears reasonable that it should be, it will also be necessary for the officer to show that this reasonable ground for making the arrest consisted of facts within his own possession at the time of the arrest, and that he cannot justify on facts which afterwards came to his notice. Nor, on the other hand, if his justification lie in the facts before him at the time of taking the party into custody, will his defence be overturned by evidence of facts indicating innocence, that came to his notice after the imprisonment.⁵

¹ *Hogg v. Ward*, 3 Hurl. & N. 417; s. c. *Bigelow's L. C. Torts*, 252.

² *Rohan v. Sawin*, 5 Cush. 281; *Brockway v. Crawford*, 3 Jones, 433; *Beckwith v. Philby*, 6 Barn. & C. 635.

³ *Perryman v. Lister*, Law R. 3 Ex. 197.

⁴ *Perryman v. Lister*, *supra*; *Hill v. Yates*, 8 Taunt. 182; *Davis v. Russell*, 5 Bing. 354.

⁵ See *ante*, pp. 78, 79.

At common law, no valid arrest without a warrant can be made for a misdemeanor, except on the spot. To arrest a man, without process, on suspicion that he has committed a misdemeanor, although upon reasonable ground of his guilt, is a breach of duty. For example: The defendant, a constable, arrests the plaintiff without a writ on the statement of J. M., that the plaintiff has committed the offence of perjury, by wilfully and corruptly making a false affidavit in a judicial proceeding before the honorable W. W., judge of a court, and he takes the plaintiff into custody upon this charge, at the direction of J. M. He is liable to the plaintiff for a false imprisonment; ¹ though he would not have been, had the offence charged been a felony.

And the arrest must not only have been made upon the spot: it must also have been made, in the case of an actual breach of the peace, before the breach has entirely ceased. For example: The defendant, a constable, takes the plaintiff into custody without a warrant under the following circumstances: The plaintiff had been making a disturbance about certain premises in the night-time, and had refused, on request of the defendant, to desist. Perceiving that the defendant intends to arrest him, the plaintiff flees and is pursued, overtaken, and arrested; the disturbance having previously ceased. The defendant is liable.²

In the case of affrays, however, an arrest may be made without a warrant not only during the actual breach of the peace, but so long as the offender's conduct shows that the public peace is likely to be endangered by his acts. Indeed, while those are assembled together who have been committing acts of violence, and the danger of renewal con-

¹ *Bowditch v. Balchin*, 5 Ex. 378.

² Compare *Baynes v. Brewster*, 2 Q. B. 375, where the defendant, on such facts, was a private citizen; but the rule would have been the same had he been an officer, as the language of Mr. Justice Williams in that case shows.

tinues, the affray may be said to continue; and during the affray, thus understood, the officer may arrest the offender not only on his own view, but even on the information or complaint of another. This is true even of an arrest by a private citizen.¹ For example: The defendant, arrests the plaintiff without process under the following circumstances: The plaintiff had entered the defendant's shop to make a purchase, when a dispute arose between the plaintiff and a servant of the defendant, resulting in an affray between them. The defendant, coming into the shop during the affray, orders the plaintiff to leave the shop, which he refuses to do; the violence having then ceased. The defendant now gives the plaintiff into the custody of an officer. This is no breach of duty to the plaintiff.²

The example given leads to the consideration of the nature of the right of a private citizen to arrest offenders without process of court; for it is (probably) lawful for such a person to make an arrest upon a warrant under the same circumstances in which an officer could do so.

The rule of law in regard to arrests for misdemeanors by private citizens is the same as prevails concerning officers: they are entitled to make the arrest without process while the breach of the peace is going on or (in accordance with the explanation given) still continues. But a private citizen has no right to make an arrest, without a writ, for a misdemeanor after its termination, though the breach of peace was committed about his own premises.³

In regard to felonies, the rights of officers and private citizens are different. While an officer can arrest without a warrant upon reasonable ground, though no felony has been committed, a private citizen can safely make an arrest

¹ *Timothy v. Simpson*, 1 Crompt. M. & R. 757; s. c. *Bigelow's L. C. Torts*, 257; *Baynes v. Brewster*, 2 Q. B. 375, 386.

² *Timothy v. Simpson*, *supra*.

³ *Baynes v. Brewster*, *supra*.

without a warrant only (1) when the felony charged has actually been committed, and (2) when there was reasonable ground for supposing the party arrested to be guilty.¹

¹ *Allen v. Wright*, 8 Car. & P. 522; s. c. *Bigelow's L. C. Torts*, 265

CHAPTER VII.

ENTICEMENT AND SEDUCTION.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty to forbear to procure or cause C to deprive B of his or her (C's) service or *consortium*.

The law of enticement and seduction gives a right of redress (1) for wrongfully interrupting the relation of master and servant, or of husband and wife, and (2) for wrongfully preventing the renewal of such relation, or in the language of the books for "harboring" the servant or wife.

The relation of master and servant is sustained not only between persons one of whom has contracted to give his services to the other, but also between persons one of whom gives his services to the other gratuitously, and between persons one of whom is under the custody or guardianship of the other. The relation thus expressed therefore includes (1) that of master and servant *ex contractu*, (2) of master and servant *ex gratia*, (3) of parent and child, and (4) of guardian and ward.

The law of enticement differs so slightly from the law of seduction, that these subjects can be conveniently treated as one in nearly all of their legal features. Unless, then, the contrary be indicated, it will be understood that what is said under either designation will apply, where the facts permit, to the other subject.¹

¹ The terms "seduction" and "enticement" are often indifferently used in the old, and sometimes in the later, books. A journeyman,

The whole subject will now be examined in the order indicated in the paragraph explaining the use of the term master and servant; the subject of husband and wife following the various divisions relating to service.

§ 2. OF MASTER AND SERVANT EX CONTRACTU.

Any person who, with notice of the existence of the relation of master and servant, interrupts that relation, without the consent of the master, by procuring the servant to depart from his master's service, violates a duty which he owes to the latter, and becomes liable in damages to him. For example: The defendant entices away from the service of the plaintiff his journeymen shoemakers, with notice of their relation to the plaintiff, persuading them to enter into his, the defendant's, service. This is a breach of duty.¹

It matters not in cases of a binding engagement to service that the servant had not yet entered upon the performance of the service at the time of the enticement or seduction. If by the terms of the contract or the apprenticeship (for there is no difference between an ordinary contract of hiring and an apprenticeship, so far as the present subject is concerned) the master has a right to require performance of the services at the time of the enticement, he has a right of redress for a wrongful interference with that right. For example: The defendant induces the plaintiff's gardener to refuse altogether to carry out his engagement to make the plaintiff's gardens, though the gardener, owing to dissatisfaction with his engagement, has already absented himself for a consid-

for example, is said to have been seduced, when he has been enticed away from his master's service. See the marginal note to *Hart v. Aldridge*, 1 Cowp. 54.

¹ *Hart v. Aldridge*, *supra*; *Walker v. Cronin*, 107 Mass. 555.

erable time from his duties under the contract of hiring. The defendant is liable.¹

In the foregoing examples, the defendant had notice of the existence of the relation of master and servant when he procured the servant to leave his master. Now, notice of the existence of this relation is necessary in all cases of actual service: in the absence of notice, the party enticing or seducing the servant violates no duty to the master. But it matters not that such party had no notice at first of the existence of the relation, if he afterwards acquire notice and then persist in keeping the servant away from his master. For example: The defendant employs the plaintiff's servant, upon application by the latter; the servant having left the plaintiff during the existence of his contract of service, of which, however, the defendant is ignorant. Afterwards the plaintiff informs the defendant that the person employed by him is his (the plaintiff's) servant. The plaintiff requests the servant to return to him, and the servant refuses; and the defendant then continues to keep him in his employ. The defendant is liable for so continuing to keep the servant, though not for taking him into his service.²

In order, however, to maintain an action for preventing a renewal of the service (for harboring a servant), and not for interrupting it, it is necessary that there should be a binding contract of service. If there be no such engagement, the defendant cannot be liable to the plaintiff for persuading the servant to stay where he is, rather than return to the plaintiff, since the plaintiff neither has any right to require the service in such a case, nor is he at the time in the enjoyment of it as a gratuity. For example: The defendant receives, without notice, a person who has

¹ Compare *Lumley v. Guy*, 2 El. & B. 216; s. c. *Bigelow's L. C. Torts*, 306.

² *Blake v. Lanyon*, 6 T. R. 221.

been acting in the service of the plaintiff under a contract void by the Statute of Frauds, and afterwards, on notice of the plaintiff's claim to the service, during the term of service agreed upon, refuses to send the person away. This is no breach of duty to the plaintiff.¹

Some question has been made, and perhaps some doubt may still exist, as to whether this doctrine concerning the liability of one who wrongfully entices, seduces, or harbors another's servant is an exception to established rules of law, and must therefore be confined strictly to cases of enticing servants in the ordinary sense of persons performing manual labor for an employer, or whether such cases are not, on the contrary, merely special instances of a wider rule of law. The latter has in England been determined to be the true view, and is somewhat countenanced also in this country.² The rule (probably) therefore is that under the designation "servant" are to be understood all persons who give another the benefit of their services, though these be not manual. For example: The defendant, with notice that W. is under a binding engagement to sing at the plaintiff's theatre, procures her to break her engagement, and not to sing for the plaintiff. This is a breach of duty, and the defendant is liable.³

The difficulty which was considered to be in the way of this doctrine was said to be, that the duty owed to the plaintiff was owed, primarily, by the so-called servant; that the act of breaking the engagement was his voluntary act; and the damage ensuing was, therefore, in the legal sense, caused by the servant's act, and not by the defendant's. But this reasoning was not regarded as satisfactory. The defendant knowingly caused the breach, by

¹ *Sykes v. Dixon*, 9 Ad. & E. 693. See, also, *Hartley v. Cummings*, 5 Com. B. 247; *Pilkington v. Scott*, 15 Mees. & W. 657.

² See *Walker v. Cronin*, 107 Mass. 555, 565, 567.

³ *Lumley v. Guy*, 2 El. & B. 216; s. c. *Bigelow's L. C. Torts*, 306.

purposely making it desirable ; and the damage was therefore the proper effect of his act. Indeed, the damage, properly speaking, results from the refusal to perform the services, rather than from the breach of the contract, as will appear by supposing that the services (actually undertaken) were gratuitous ; and the act of the defendant causes the refusal.¹

§ 3. OF MASTER AND SERVANT EX GRATIA.

It was formerly a matter of some doubt if an action could be maintained for interrupting, with notice, the gratuitous relation of master and servant. It was sometimes supposed that inasmuch as the master in such a case could not require the services, he had no right to them which could be infringed. But this view never extensively obtained. Though a person may not be able to require the bestowment of a gratuity, he has a right to it when it is bestowed, and no one may interrupt his actual enjoyment of the gratuity. Hence if a person be actually engaged in giving his services to another, any one who, with notice, voluntarily interrupts the service violates a legal duty to the recipient of the gratuity, and becomes liable in damages. For example: The defendant, with notice, entices away a young woman while she is in the gratuitous service of the plaintiff, and thereby deprives the plaintiff of the benefit of her help. The plaintiff is entitled to recover damages therefor.²

Indeed, it matters not in such cases that the person enticed was actually under obligation to another: if the latter do not insist upon his rights, no third person can set up those rights to escape liability for a wrongful

¹ See further the author's note to *Lumley v. Guy*, L. C. Torts, 325, 326.

² *Evans v. Walton*, Law R. 2 Com. P. 615. The young woman in this case was the plaintiff's daughter, but she was of age.

act. For example: The defendant, with notice, seduces a married woman while she is rendering gratuitous service to the plaintiff, her father. The defendant is liable, and cannot set up in defence the paramount right of the woman's husband to her help.¹

As was observed, however, in the preceding section, and as follows from what has been said in the present, no action can be maintained for mere harboring a gratuitous servant, though with notice: the action lies solely for enticing the person away or otherwise interrupting the performance of the service while the servant is disposed to, and engaged in, the performance of it. When the servant has put an end to the relation, which, in the case of gratuitous services, he may ordinarily do at any time, the rights of the master at once terminate.

§ 4. OF PARENT AND CHILD.

A parent's right of action against one who has seduced or enticed away his minor child rests either upon his right to require the child's services, and the benefit receivable therefrom; or, where the right to require the child's service does not (by reason of emancipation or otherwise) exist, upon the benefits that might have been derived from the performance of the child's voluntary service. The right of action does not depend upon the parent's relationship to his child.

It follows that the parent (father or mother, according to circumstances) has a right of action for the child's seduction so long at least as the child remains at home, accepting authority from the parent; and this is true, even though the child has attained majority, as would follow from what has been said in the preceding section, and as will further appear in the present.

¹ *Harper v. Suffkin*, 7 Barn. & C. 387.

In England, it is considered that the parent's (the father's, and, of course, the mother's) right of action for the seduction of his child terminates when the child leaves her parent's house, and has no intention of returning.¹ In America, however, this doctrine is not accepted. The criterion of the *father's* right of action in this country is considered to depend, not upon the will of the child, but upon the will of the parent; and hence, notwithstanding the absence of the child from her father's house at the time of the seduction, the father has a right of action if he has not divested himself of his right to require her services, even though she were at the time of the wrong in the service of another with her father's permission. For example: The defendant seduces the plaintiff's daughter under the following circumstances: the daughter, at the age of nineteen, with the consent of her father, the plaintiff, goes to live with a relative, for whom she works when she pleases, receiving pay for her labor. While thus at her relative's house, she is seduced and got with child by the defendant, and at once returns to her father's, and is there cared for. She, however, had no intention, but for the seduction, to return to her father. The defendant has violated a duty to the plaintiff, since the plaintiff had a right to require his daughter's services at the time of the seduction.²

This, however, is the extent of the American rule. If the power of the parent over his daughter be gone at the time of the seduction, whether by his own consent in emancipating her or binding her out to service, or by the act of the law in taking her away from him, the seducer has vio-

¹ *Dean v. Peel*, 5 East, 45. See *Griffiths v. Teetgen*, 15 Com. B. 344; *Manly v. Field*, 7 Com. B. n. s. 96; *Hedges v. Tagg*, Law R. 7 Ex. 283.

² *Martin v. Payne*, 9 Johns. 387; s. c. *Bigelow's L. C. Torts*, 286, and cases cited on p. 291 of the same work.

lated no legal duty to him ; though there has been some conflict as to the application of this doctrine in the case of the return of the daughter to the parent after the seduction, — a point to be considered hereafter.

It is considered, however, that, if the parent's control over his child was divested by fraud, he may treat it, even after the seduction, as never having been abandoned, and maintain an action against the seducer. For example: The defendant hires the plaintiff's daughter from his service with intent to seduce her, and by this means obtains possession of her person, and seduces her. The plaintiff is entitled to recover for his loss of service as if he had seduced the daughter in the actual service of her father.¹

It is not necessary that the child should have performed specific *acts* of service. The right to the service is enough. This is true even in England, where the courts have been more strict in enforcing the necessity of the existence of the relation of master and servant between the parent and child than those of this country.² For example: The defendant seduces the minor daughter of the plaintiff, a gentleman of wealth, while she is away from home attending a boarding-school, where she was to stay indefinitely. The defendant is liable.³

The father's right of action continues, as has already been observed, after the daughter has come of age, if the relation of master and servant still exist. If the parent continue to exercise authority over the daughter after her majority, and she continue to submit, she is still his servant, though not under an actual engagement to serve him ; and seduction under such circumstances is a breach of

¹ Speight v. Oliviera, 2 Stark. 493. See Evans v. Walton, Law R. 2 Com. P. 615, 624.

² Terry v. Hutchinson, Law R. 3 Q. B. 599, 602, Blackburn, J. ; Maunder v. Venn, Moody & M. 323.

³ See the language of Spencer, J., in Martin v. Payne, *supra*.

legal duty to the parent. For example: The defendant seduces the plaintiff's daughter, aged twenty-two years. Prior to and at the time of the seduction, the daughter has been living part of the time with her brother, who resides about a mile from her father's house, and part of the time with her father. She has not received wages from her brother, and when at home has worked for her mother, the plaintiff buying her clothing. The daughter is the plaintiff's servant, and the defendant is liable.¹

By the American law, it is not necessary that the female's seduction should be followed by pregnancy, in order to constitute the defendant's act a breach of duty to the father; though the contrary has been held in England.² The American rule is, that where the proper effect of the connection is an incapacity to labor, by reason of which the plaintiff loses the services of his daughter and servant, the loss of such services entitles the plaintiff to recover against the seducer. The same principle which gives a master an action where the connection causes pregnancy applies to the case of sexual disease, and, indeed, to all cases where the proper consequence of the act of the defendant is a loss of health resulting in an incapacity for such service as could have been rendered before. For example: The defendant seduces the plaintiff's minor daughter, by reason of which, without becoming pregnant (or being affected with sexual disease), she suffers general injury in health, so that it becomes necessary for the plaintiff to send her away for her health; whereby he incurs expense and loses his daughter's services. The defendant is liable.³

If, however, the loss of health be caused by mental suf-

¹ *Sutton v. Huffman*, 3 Vroom, 58.

² *Eager v. Grimwood*, 1 Ex. 61.

³ *Abrahams v. Kidney*, 104 Mass. 222. See *Van Horn v. Freeman*, 1 Halst. 322.

fering, not the consequence of the seduction, but produced by subsequent intervening causes, the loss of service is not the proper consequence in contemplation of law of the defendant's act; and hence the action cannot be maintained.¹ For example: The defendant seduces the plaintiff's minor daughter, and subsequently abandons her, in consequence of which she suffers such distress of mind as to bring illness upon her, and incapacitate her for performing services for the plaintiff; no pregnancy or disease resulting by direct consequence of the seduction. The defendant is not liable to the plaintiff.²

If a loss of service follow as the proper effect of the defendant's act, it is immaterial that he accomplished his purpose without resorting to seductive arts. The willingness of the daughter cannot affect the parent's rights;³ though it has sometimes been supposed that the ready consent of the young woman might be ground for mitigation of damages.⁴

What has been said in the preceding paragraphs concerning the parent's right of action for loss of service must be understood of the father's claim to damages. During his guardianship of the daughter, the right of action be-

¹ *Abrahams v. Kidney*, *supra*; *Boyle v. Brandon*, 13 Mees. & W. 738.

² *Boyle v. Brandon*, *supra*.

³ *Damon v. Moore*, 5 Lans. 454.

⁴ *Hogan v. Cregan*, 6 Rob. (N. Y.) 138, criticised in *Damon v. Moore*, *supra*. Perhaps this would be true if the daughter were a notoriously loose character, and had already brought her family to mortification and shame. In general, the damages in an action by a parent for seduction are not confined to the loss of service. While the loss of service is of the gist of the action, still when the loss is established, and shown to have been caused by the defendant's acts, the court permits the jury to give damages for the shame that has been inflicted upon the plaintiff's family. L. C. Torts, 294. But, if the shame and sense of disgrace had already befallen his family by the daughter's conduct, the defendant could hardly be liable for any thing beyond the loss of service.

longs to him alone. Should he be removed by the law from his natural position of authority, or should he die during the child's minority, the question arises of the mother's right of action against the seducer. It is clear if the guardianship of the child has been given to her, she has a right of action for the loss of service; though it may be doubted if at the present time the mere relation of guardian, apart from that of parent, would, in all cases, afford a right of action for the child's seduction, — a point to be further adverted to in the next section.

If, upon the death of the father, or upon his removal by the law from the position of guardian, the guardianship and custody of the daughter should be granted to a third person, the mother could not maintain an action for the subsequent seduction of her daughter; and the same would be true, where the mother having received the guardianship from court or having continued to receive obedience and service from the daughter, should bind her out to the service of another. This follows from what has been said concerning the rights of the father.

A difficulty arises where the mother, upon the death of the father, or his removal from the guardianship, simply continues to exercise authority over her daughter, and to receive her (voluntary) obedience, without having received an appointment as guardian. The mother's right of action has sometimes been supposed to turn upon the question of her right to require the child's support in such a case, — a doubtful point of law. It is now well settled, however, that so long as the daughter continues to give obedience and service to her mother, the latter has a right of action for a wrongful interruption of the daughter's position of servant.¹ For example: The defendant seduces the minor daughter of the plaintiff, a widow. The daughter, having previously been in the service of the defendant, and then

¹ This also follows from what has been said in § 2, *supra*.

in the service of D., returns from the latter person to her mother to aid her during sickness in the family. While thus with her mother for a day or two, she is got with child by the defendant. The defendant has violated a legal duty to the plaintiff, and is liable in damages.¹

The authority from which this example has been given, went one step further, and decided that the mother's right of action was not affected by the fact that the daughter, when seduced, was actually in the service of another, so long as she indicated a willingness to consider her mother as still entitled to her assistance; though the case would have been different had the mother herself hired her daughter out.

Whether this position of the mother's right of action for her daughter's seduction while actually rendering assistance to her, though in the employ of a third person, would be controverted is not clear. But it has been a question of disputed authority if the mother can sue when the seduction, in such a case, occurs not at the mother's house while the daughter is assisting her, but at the house of her employer; supposing the mother not to have hired out her daughter, but merely consented to her departure. If, in a case of this kind, the daughter should not return to her mother during her illness, the mother's right of action must turn wholly upon her right to require her daughter's services. In other words, is the mother's position, after the termination of the father's guardianship, equal in point of right and authority to the father's? It has already been suggested that this is an unsettled question; but very strong reasons can be given in favor of an affirmative answer.²

There is also conflict of authority concerning the mother's

¹ *Gray v. Durland*, 51 N. Y. 424.

² The author has given the subject consideration in his *Leading Cases on Torts*, at p. 302.

right of action in such cases where the daughter in her illness returns to her mother, and is supported and cared for during her sickness. The daughter's return, however, under such circumstances does not indicate that she had any intention of returning before the seduction; and, unless the mother is considered to have the legal right to require her daughter's service, it is difficult to see how she can be entitled to sue for the seduction in a case of that kind.¹

At common law, the child is not entitled to sue for her own seduction, since she has consented to the act. But this rule has been changed by statute in some of the States so as to give the young woman a right of action in case she has actually been seduced from virtue by the defendant. And even at common law, if the seduction was effected under a promise of marriage, which is afterwards broken, the young woman has a right of action; but the action is for the breach of promise of marriage, and not for the seduction. The seduction in such a case, however, entitles her to aggravation of damages.

For the same reason which at common law precludes the daughter from suing, the parent is barred if he consented to the act, or perhaps if he facilitated it by his own misconduct in respect of the morals of his daughter. For example: The defendant is permitted by the plaintiff to

¹ The mother's right of action in such cases is denied in *South v. Denniston*, 2 Watts, 474; *Roberts v. Connelly*, 14 Ala. 235. It is supported in *Sargent v. —*, 5 Cowen, 106. It is obvious that the rules of law as to cases like those stated must remain in uncertainty and conflict until the nature of the mother's authority is definitely settled; and a uniform legislation seems required for the purpose. Indeed the nature of the father's rights has possibly been rendered somewhat uncertain by modern decisions, declaring that, except through the operation of the criminal law or the poor laws, he is not bound to support his children. See *Bageley v. Forder*, Law R. 3 Q. B. 559, Cockburn, C. J.; *Kelley v. Davis*, 49 N. H. 187; *Bigelow's L. C. Torts*, 298-300.

visit his daughter as a suitor, after notice that he is a married man and a libertine; the defendant, on inquiry by the plaintiff as to this matter, representing that his wife is an abandoned character, and that he will soon obtain a divorce from her, and then marry the plaintiff's daughter. The defendant afterwards, while continuing his visits at the plaintiff's house, seduces the young woman. The plaintiff is not entitled to recover for the seduction.¹

§ 5. OF GUARDIAN AND WARD.

Not only the parent, but any one standing *in loco parentis*, and being entitled to, or receiving, in his own right, the services of a child under majority, is entitled to maintain an action for loss of services against any one who wrongfully interrupts the rendering of them, or makes the full rendering of them impossible. For example: The defendant seduces the plaintiff's niece, the parents of the young woman being dead, and the plaintiff standing *in loco parentis*. The defendant is liable, though the young woman has property left her by her parents, and performs but slight services.²

A step-father, not bound to care for his step-daughter, cannot sue for her seduction unless she was at the time of the seduction actually giving submission to him. For example: The defendant seduces the plaintiff's step-daughter while she is at service on her own account at the defendant's father's. After the seduction, she returns to the plaintiff's house where she has lived for twelve years before entering service for the defendant's father. The defendant has not violated any duty to the plaintiff.³

¹ Reddie v. Scoolt, Peake, 240. But comp. p. 158.

² Manvell v. Thompson, 2 Car. & P. 303. And, as in the case of an action by the father, damages may be given beyond the value of the services. Irwin v. Dearman, 11 East, 23; Ingersoll v. Jones, 5 Barb. 661.

³ Bartley v. Richtmyer, 4 Comst. 38.

The right of action in all such cases, and in cases strictly of guardian and ward, depends (probably) upon the right of the guardian or person standing *in loco parentis* to receive the services to his own benefit. If the guardian have merely the supervision of the ward and her income, while she lives elsewhere, or performs service elsewhere, the guardian simply receiving her wages and acting as her trustee, it is improbable that he can sue for her seduction.

§ 6. OF HUSBAND AND WIFE.

To entice away, or to corrupt the mind and affections of one's consort is a civil wrong for which the offender is liable to the injured husband or wife; though not perhaps to the party enticed or corrupted, unless the act was accomplished by fraud or violence.

The gist of the action, however, is not the loss of assistance, but the loss of the *consortium* of the wife or husband, under which term is usually included the person's affection, society, or aid. But it is not necessary that there should be any separation or pecuniary injury; in which respect the action resembles that of a parent for the seduction of his daughter. For example: The defendant, by false insinuations against the plaintiff, and other insidious wiles, so prejudices and poisons the mind of the plaintiff's wife against him, and so alienates her affections from him, as to induce her to desire and seek to obtain, without just cause, a divorce; and by his false insinuations and wiles succeeds in persuading his wife to refuse to recognize the plaintiff as her husband. The defendant is liable; though no actual absence of the wife is caused.¹

This example, it will be observed, does not go to the extent of declaring a person liable for enticing away or corrupting the affections of the wife by reason of charges

¹ *Heermance v. James*, 47 Barb. 120.

against the husband which are *true*; but there can be little doubt that such an act would be a breach of duty to the husband.¹ The constancy and affection of a wife are all the more valuable to him if his conduct is bad, since they may save him from ruin.

A difference is deemed to exist, however, between the act of a parent and that of other persons with regard to persuading a wife to leave her husband. In the case of one not a parent, it is not necessary that bad motives should have inspired the act.² Such a person has no right to entice or persuade a wife to leave her husband. It does not follow, however, that mere advice to a married woman by a stranger to leave her husband, upon representations by the wife, would be unlawful: advice in such a case is one thing, and enticement is another.

In regard to a parent, however, it is considered that it is no breach of duty to the husband for such a person, upon information that his daughter is treated with cruelty by her husband or is subjected to other gross indignities such as would justify a divorce, to advise, or perhaps to persuade, her to depart from her husband; though it subsequently appear that the advice or persuasion was based on wrong information.³ It is held that bad motives must have actuated the parent in order to make him liable.⁴ This seems to mean that the parent must either have enticed his daughter to leave or to stay away out of ill-will towards her husband, and not by reason of any good ground for their separation; or that he must have some end to gain of personal benefit to himself. In the absence of facts of

¹ See *Bromley v. Wallace*, 4 Esp. 237. The conduct of the husband could be shown only in mitigation of damages. *Ib.*

² See *Hutcheson v. Peck*, 5 Johns. 196; *Bennett v. Smith*, 21 Barb. 439.

³ *Bennett v. Smith*, 21 Barb. 439, 443.

⁴ *Hutcheson v. Peck*, *supra*.

this character, the parent is not liable for persuading his daughter to absent herself from her husband on information justifying (if true) a divorce; though a stranger in blood would be liable. The parent may therefore persuade, where a stranger may only advise.

Where a separation has already taken place before the act complained of was committed, the rule of law is said to be, that any person who receives a married woman into his house, or suffers her to stay there after receiving notice from the husband not to harbor her, violates a duty which he owes to the husband; unless the husband has by his cruelty or other misconduct forfeited his marital rights,¹ or, it should be added, unless the separation was made under articles of agreement therefor. For example: The defendant receives the plaintiff's wife into his house upon representations of ill-treatment by her husband; and he continues to permit her to remain there after notice from the plaintiff not to do so. The defendant is deemed to be guilty of a breach of duty to the plaintiff; supposing the wife's representations to be false.²

This doctrine, however, must (probably) be limited to cases in which the defendant has clear notice that the wife's act in coming to him, or in staying with him, is intended as a separation by her from her husband, and a repudiation of his claims as such. A man cannot at the present day be liable in damages for allowing a married woman to remain in his house a few days after notice not to do so, if she deny that she has abandoned her husband and claim that she is merely visiting, or that she is away from home for some other temporary and reasonable purpose. The defendant's liability, when it exists, rests upon the ground that he is a party to the unlawful purpose of depriving the plaintiff of the benefit of some advantage embraced under

¹ Addison, Torts, 905 (4th ed.).

² *Philp v. Squire*, Peake, 82.

the designation of the *consortium* of his wife.¹ If the wife were disposed to stay an unreasonable length of time after notice from the husband, that fact would perhaps be sufficient to cause him to suspect her true purpose, and to render him liable in case he continue to permit her to remain.

It is settled law that the mere fact of receiving another's wife is not unlawful, even though no explanation whatever be offered.² There must be an enticing or harboring with reference to a wrongful separation. It is not enough even that the defendant take the plaintiff's wife to the defendant's house, upon request by her, unless he has notice that she is abandoning her husband; though he has been required by the plaintiff not to harbor her. For example: The defendant and the plaintiff are farmers and neighbors, residing about two miles apart. Their wives are relatives, and the plaintiff's wife often visits the defendant's; the defendant taking her to his house in his wagon. The plaintiff's wife on one occasion being so at the defendant's house, the plaintiff gives the defendant written notice not to harbor her, but to return her to his residence from which he (the defendant) has taken her. The defendant having stopped with the lady near her husband's house, she goes to enter it, but finds the door locked, and returns to the defendant, requesting him to take her to his house. The defendant shows her the notice, and advises her not to go, but she makes light of the notice, and is taken to the defendant's house. The next day the defendant carries her home; and the plaintiff brings suit for the harboring. The action is not maintainable; the defendant not having attempted to influence the wife to leave her husband.³

¹ See *Barnes v. Allen*, 1 Keyes, 390; *Hutcheson v. Peck*, 5 Johns. 196; *Schuneman v. Palmer*, 4 Barb. 225.

² *Barnes v. Allen*, 1 Keyes, 390; *Schuneman v. Palmer*, 4 Barb. 225.

³ *Schuneman v. Palmer*, *supra*.

Further, it follows from what has already been stated, that in the case of a parent it is sufficient to justify his receiving his daughter, and refusing to turn her out of doors, that he has information such as, if true, would entitle the wife to a divorce; though the information afterwards turn out to be false. A stranger, according to the proposition under consideration, and judicial authority,¹ would need to show the truth of the information.

The right of action for seducing and debauching a man's wife rests upon the same ground as that for the enticement or harboring of her, to wit, the loss of *consortium*,² and arises therefore without regard to the infliction of pecuniary damage.³

It follows that upon separation, by articles of agreement the husband, having voluntarily parted with his wife's *consortium*, cannot maintain an action for criminal conversation with his wife.⁴ But if the separation was without any relinquishment by the husband of his right to the society of his wife, the action is maintainable. For example: The defendant, having entered into a contract for the support of the plaintiff's wife at his (the defendant's) house, the wife goes there under the agreement, and the defendant seduces her. The act is a breach of duty to the plaintiff, for which the defendant is liable.⁵

The mere fact of the husband's infidelity to his wife does not change the nature of the defendant's act in seducing and debauching her; though it may possibly, in contemplation of law, affect its enormity. For example: The defendant seduces and has criminal intercourse with the

¹ Philp v. Squire, Peake, 82.

² Weedon v. Timbrell, 5 T. R. 357.

³ Wilson v. Webster, 7 Car. & P. 198.

⁴ Harvey v. Watson, 7 Man. & G. 644.

⁵ See Barber v. Armstead, 10 Tred. 530; Chambers v. Caulfield, 6 East, 244. Weedon v. Timbrell has been limited to this extent.

plaintiff's wife. Proof is offered by the defendant that the plaintiff had shown the greatest indifference and want of affection towards his wife; that while she lay dangerously ill at Y., the plaintiff (a navy surgeon), though his vessel was at Y., and he landed almost daily, was often at the door of the house where his wife lay sick, without visiting her, or showing any anxiety or concern for her; and at the same time that he had been guilty of adultery and had contracted a venereal disease. This is no defence to the action;¹ though it might be considered in mitigation of damages.²

If, however, the husband was accessory to his own dishonor, the case is different: he could not complain of an injury to which he had consented.³ For example: The plaintiff allows his wife to live as a prostitute, and the defendant then has intercourse with her. This is no breach of duty to the plaintiff.⁴

Mere negligence as to the wife's behavior, inattention, or dulness of apprehension, or even permission of indecent familiarity in the husband's presence, are, however, deemed insufficient to bar a recovery for criminal conversation with the wife; though such facts might be proved in reduction of damages. Unless the conduct of the husband amount to consent to the defendant's act of intercourse, the defendant is liable.⁵

It follows from what has been said that condonation of the wife's offence does not excuse the man who debauched her: the sole consequence of the condonation is to preclude

¹ *Bromley v. Wallace*, 4 Esp. 237, overruling *Wyndham v. Wycombe*, *Ib.* 16.

² *Ib.* *Rea v. Tucker*, 51 Ill. 110.

³ *Volenti non fit injuria.*

⁴ See *Sanborn v. Neilson*, 4 N. H. 501. This case decides that the husband's connivance at his wife's intercourse with other men than the defendant does not excuse the defendant.

⁵ 2 Greenleaf, Evidence, §§ 51, 56; Bigelow's L. C. Torts, 338. But comp. pp. 151, 152, *ante*.

the husband from obtaining a divorce. For example: The defendant has criminal intercourse with the plaintiff's wife, and, when fatally sick, she discloses the fact to her husband. The plaintiff continues to care for her kindly until her death. The defendant is liable.¹

¹ *Wilson v. Webster*, 7 Car. & P. 198.

CHAPTER VIII.

TRESPASSES UPON PROPERTY.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty (1) to forbear to enter the latter's close without permission; (2) to forbear to take possession of the latter's chattels, or deprive him of his possession thereof (the same being in B's hands) without permission; unless, in either case, he has a better right than B has to the possession of the property.

OBSERVATIONS.

1. The term "close" signifies a tract of land, whether physically enclosed or not.

2. "Breaking and entering the close" is an ancient term of the law, commonly used in pleading, indicating an unlawful entry upon land. The term "entry" or "unlawful entry" will be used in the present chapter as synonymous to "breaking and entering," unless the contrary be indicated.

3. A trespass to land is an unlawful entry upon land: a trespass to goods is an unlawful taking of goods. All other wrongful acts connected with the trespass are aggravation of the trespass.

§ 2. OF POSSESSION.

In order to maintain an action solely for damages for a trespass to land, and not merely for the recovery of the land, it is necessary for the plaintiff (if not a reversioner or remainder-man) to have possession of the premises

entered at the time of the entry. A person who enters the land of another without the latter's permission, the latter having been previously unlawfully deprived of possession or the land having never been in his possession, *may*, indeed, violate a duty to the person entitled to the possession; but the law requires the latter to get possession of the land before giving him damages for the wrong committed.

If, however, the party had possession at the time of the entry, and the trespasser ejected him, it would not be necessary for him to recover possession before he could sue for damages for the wrongful entry and expulsion: he had possession at the time of the trespass and disseisin, and that is sufficient for the purposes of such an action.¹ He could not, however, recover damages for the loss sustained by reason of the disseisor's *occupancy*, until after a re-entry,² — a point to be further considered hereafter.

On the other hand, possession at the time of the entry, if held under a claim of right, is *prima facie* sufficient in all cases to enable a person to maintain an action for an entry upon the land without permission; and possession merely is not only *prima facie* but absolutely sufficient against all persons who have not a better right than the possessor. It follows that one who is in possession of land under a claim of title, though without right, may recover for an entry by a wrong-doer; that is, by one who enters without a right to do so. For example: The defendant enters without permission upon enclosed land in the possession of the plaintiff. The plaintiff, being grantee of land from the State, has taken possession wrongfully of more than his deed conveys; and the defendant's entry is made upon that part of the tract in the plaintiff's possession which was not conveyed to him. The defendant is liable.³

¹ Case v. Shepherd, 2 Johns. Cas. 27.

² *Ib.*

³ Cutts v. Spring, 15 Mass. 135; s. c. Bigelow's L. C. Torts, 341.

The defendant is not necessarily guilty of a breach of duty to such a possessor by reason of the fact that he is not the owner of the land. He may still have a legal or equitable interest in the premises; he may be a lessee of the land, or he may be a trustee of the same or the latter's *cestui que trust*. In any of these cases, he would be entitled to enter upon the premises, if he could do so without breaking the peace. Indeed, a licensee may have a right to make a peaceable entry, though he has no interest whatever in the soil, and could have no right of entry against a person entitled to the possession. For example: The defendant enters without permission premises of which the plaintiff is wrongfully in possession; the act being done by direction of the owner of the land, who is entitled to possession. The defendant violates no duty to the plaintiff; though the case would have been different had he entered without authority of the owner.²

If there be two persons in a close, each asserting that the premises are his, and each doing some act in the assertion of the right of possession, he who has the better title or right is considered as being in possession; and the other is a trespasser. The former is therefore in a position to demand damages of the latter for his wrongful entry. For example: The defendant is in possession of land jointly with the plaintiff, claiming to be a tenant in common of the premises with the plaintiff. His claim, however, is unfounded, and the plaintiff is owner of the close. The defendant may be treated by the plaintiff as a trespasser and sued in damages.³

If neither of the parties in possession has a right to the

¹ *Chambers v. Donaldson*, 11 East, 65.

² The subject of rights of entry in general will be considered hereafter, § 3. It is introduced here merely to show the consequences of possession.

³ *Hunting v. Russell*, 2 Cush. 145.

close, the question whether either of them has violated a duty to the other, supposing each to claim the exclusive possession, will depend upon the priority of entry. The one who first entered, if his possession be continuous, will be entitled to the possession as against the other, and the latter will be a trespasser. For example: The defendants claim a right to take cranberries in an unoccupied field under a license from one H. The plaintiffs have previously entered into possession of the land, and forbidden all persons by public notice to take cranberries therefrom, except on certain conditions with which the defendants do not comply. H., under whom the defendants claim, had entered before the entry of the defendants; but neither H., nor the defendants, nor the plaintiffs have any right to the soil or the berries. The defendants have violated no duty to the plaintiffs.¹

Interference with a man's possession of personal property, without permission, is in like manner a trespass, unless done by one having a better right than the possessor. In other words, a defendant in an action for trespass to goods cannot deny the plaintiff's right of possession (the same not being acquired by theft, violence, or other wrongful act), unless he can show a better right in himself or an authority from one having a better right than the plaintiff.² For example: The defendant, an officer of the army of the United States, takes a horse out of the plaintiff's possession, which has been captured in war by the army, and has then fallen into possession of the plaintiff; who, however, has no title or right of possession against the government. The defendant acts under the orders of a superior officer, who has no authority from the government to give the order. The defendant's act is a breach of duty

¹ Barnstable v. Thacher, 3 Met. 239.

² Cook v. Howard, 13 Johns. 276; Demick v. Chapman, 11 Johns. 132; Outcalt v. Durling, 1 Dutch. 443.

to the plaintiff, for which he is liable in damages.¹ Again : The defendant, a constable, levies upon, and takes away without permission, a horse in the plaintiff's possession as the horse of A. A is the owner of the animal, but the plaintiff has a lien upon it. The defendant's act in taking the horse out of the plaintiff's possession is a trespass.²

It should be explained in this connection that by the common-law rules of pleading, and probably by the rules of pleading generally prevailing at the present time, it is incumbent upon the plaintiff in an action either of trespass, trover, or replevin (the last named being an action to recover specific goods), to allege that the property is his. But this allegation is deemed to be fulfilled by evidence that he came into possession of the goods in a lawful manner, whether by sale, express bailment by the owner, or by finding ; and then, unless the defendant show a better right, the plaintiff is entitled to recover. The custody of a mere servant, not a bailee, of his master's goods is, however, deemed insufficient.³

Evidence that the plaintiff had acquired his possession by theft, violence, or other wrongful act, without title or right, would not support the allegation of property ; and it follows that such a person could not claim that the act of the defendant in interfering with his possession was a breach of duty.⁴

A reversioner or remainder-man can maintain an action for injuries done to his interest, notwithstanding the fact that the land is in the possession of a tenant. Injuries done to such interests are not, however, in strictness trespasses, but at most only the consequences of trespasses.

¹ Cook v. Howard, *supra*.

² Outcalt v. Durling, *supra*.

³ Harris v. Smith, 3 Serg. & R. 20 ; Hampton v. Brown, 13 Ired. 18.

⁴ Buckley v. Gross, 3 Best & S. 566 ; Kemp v. Thompson, 17 Ala. 9. See *post*, pp. 187, 188.

The trespass consists in the wrongful entry upon the land, and this is a tort to the tenant, and not to the landlord or remainder-man ; since it is an interference with the possession, which belongs to the tenant.¹ For example : The defendant enters upon the plaintiff's land, held by a tenant, in the assertion of an alleged right of way, driving thereon his horses and cart, and continuing so to do after notice from the plaintiff to quit. The defendant has violated no duty to the plaintiff ; though he would be liable to the tenant.²

A common law tenant at will, on the other hand, is deemed to have no possession ; and the possession being in the owner, he is in a situation to sue for the wrongful entry as a trespass to himself. For example : The defendant wrongfully enters the plaintiff's close and overturns a small building thereon, while the close is in the occupation of one H. ; he having hired the premises of the plaintiff upon an invalid lease. The defendant's entry is a trespass, for which he is liable to the plaintiff.³

Damage done to the inheritance in the case of leasehold or mortgaged land is waste if committed by the tenant or mortgagor, and something of the nature of a trespass if committed by a stranger. But whatever term may be applied to the act, it is a breach of duty to the landlord or mortgagee, for which he is entitled to recover damages. For example : The defendant, a tenant, or a mortgagor, or a licensee, or a stranger, cuts down trees on land owned by the plaintiff, or of which he is mortgagee or remainder-man, without the plaintiff's consent. This is a breach of duty to the plaintiff, and the defendant is liable to

¹ It follows, where the common-law system of pleading prevails, that the landlord or remainder-man cannot sue in trespass : his action is case. *Lienow v. Ritchie*, 8 Pick. 235.

² *Baxter v. Taylor*, 4 Barn. & Ad. 72. The action was case.

³ *Starr v. Jackson*, 11 Mass. 519.

him in damages ; though the plaintiff is not in possession.¹

A similar rule of law prevails as to injuries done to personal property, which is held on lease or bailment, or by a mortgagor in possession. For an injury done to the possessor's interest merely, that is, for a simple unlawful taking of the goods, the remedy belongs to the possessor alone ; but for an injury done to the reversion or to the mortgagee if the goods be mortgaged, the lessor, bailor, or mortgagee is entitled to treat the act as a breach of duty to him and call for redress.² For example : The defendant levies on and sells goods in the possession of S., whose right to the possession rests upon an agreement by the plaintiff to convey the same to him upon the payment of notes given therefor. The defendant has not been led by the plaintiff to suppose that the goods belong to S. : on the contrary, the defendant has notice at the time of the levy of the plaintiff's title. The defendant's act in disposing of the goods is a breach of duty to the plaintiff, and he is liable in damages ; though the right of possession is in S.³

There exists, however, this difference with reference to the possession of real and of personal property. The ownership of personal property draws to the owner the possession thereof in law, and not merely the right of possession, unless the owner has voluntarily parted with his right of possession, as by lease ; while, as has been seen, the ownership (of itself) of real property draws to the owner merely the right of possession of the land. It fol-

¹ See *Young v. Spencer*, 10 Barn. & C. 145 ; *Page v. Robinson*, 10 Cush. 99 ; *Cole v. Stewart*, 10 Cush. 181. None of these are cases of actions by remainder-men, but they cover such cases in principle. The form of action at common law is case and not trespass. *Livingston v. Mott*, 2 Wend. 605 ; *Cannon v. Hatcher*, 1 Hill (S. C.), 260.

² In case, of course, at common law.

³ *Ayer v. Bartlett*, 9 Pick. 156.

lows that the owner of personal property, unlike the owner of real property, is, by mere virtue of his ownership of the same, in a situation to recover damages for an unlawful interference with his right of possession. For example: The defendant, without permission, takes goods out of the possession of A, after A has sold them to the plaintiff, but before they have been delivered to the plaintiff. This is a trespass to the plaintiff.¹

A man's close includes not only his actually enclosed land, but also all adjoining unenclosed lands held by him; and, if he be in possession of any part of his premises, he is in possession of the whole, unless other parts be occupied by tenants or by persons who claim adversely to him. The owner of premises, when thus in possession of the whole, is considered by the law as in constructive possession of the premises belonging to him which adjoin those in his immediate enclosure; and the consequence is, that a person in such a situation is in a proper position to recover damages for trespasses committed in any part of his premises, the unenclosed as well as the enclosed. For example: The defendant, without permission, enters and cuts timber in an open woodland of the plaintiff, adjoining a farm upon which the plaintiff resides. The plaintiff is deemed to be in constructive possession of the woodland, and is entitled to recover.²

The highway in front of a man's premises is also constructively in his possession, when the soil has not been conveyed to the public; and while, inasmuch as the way has been dedicated to the use of the public as a way, no one violates a duty to the adjoining occupant by passing over the land thus dedicated, the case is different if an attempt be made to exercise rights therein not contem-

¹ Bacon's Abr. Trespass (C), 2; Bigelow's L. C. Torts, 370.

² Machin v. Geortner, 14 Wend. 239; Penn v. Preston, 2 Rawle, 14

plated in the dedication, and of special harm to the adjoining owner.¹ For example: The defendant goes upon premises in the public highway, in front of land of the plaintiff occupied by him, and on the plaintiff's side of the highway, and there, without leave, digs up the soil. The land composing the highway has never been conveyed to the public; the public having simply an easement in the use of it. The defendant has violated a duty to the plaintiff, and is liable to him.² Again: The defendants, a turnpike company, go upon land in their turnpike lying in front of and next to the plaintiff's premises, and without license cut away the herbage, spontaneously growing there; not owning the land in the way. They are liable to the plaintiff.³

The foregoing propositions in regard to constructive possession suppose that the party injured has a right to the possession of the enclosed premises actually occupied by him. A party, however, who is in possession of land without title or right can have no such constructive possession: the rights of a bare possessor are limited by the bounds of his actual occupation. For example: The defendant, having wrongful possession of the south end of a lot, cuts timber upon the north end thereof, lying without the limits of his actual occupation; which timber has been purchased and duly marked by the plaintiff. The land on which the timber stood is not in the possession of the defendant, and the plaintiff is entitled to damages for the violation of his right of property; though he has no right to the land.⁴ Again: The defendant, without right or authority, enters

¹ A wrongful use of the highway, which does not result in special damage to any one of the public, cannot be redressed by the adjoining owner in his own right. The remedy lies with the public. See Ch. 10, Nuisance.

² *Robbins v. Borman*, 1 Pick. 122.

³ *Adams v. Emerson*, 6 Pick. 57.

⁴ *Buck v. Aikin*, 1 Wend. 466. The plaintiff became possessed of the trees as soon as they were cut by the defendant, according to the rule stated, *ante*, p. 166.

upon an open woodland adjoining enclosed land in the wrongful possession of the plaintiff. The act is no breach of duty to the plaintiff.¹

One of several cotenants, whether of real or of personal property, cannot maintain an action for acts relating to the common property, not amounting to an ouster; because all the cotenants have equal rights of possession and property. For example: The defendant, cotenant of land with the plaintiff, cuts and carries away therefrom timber, at the same time denying to the plaintiff any right in the premises, but not withholding possession from him. The defendant has violated no duty to the plaintiff.²

If, in the case of real estate, the act of the defendant, however, amount to an ouster of the plaintiff from the possession of the common property, the act is a trespass, and the defendant is liable; provided, at least, an action of ejectment would at common law be maintainable. For example: The defendant, being cotenant with the plaintiff of a certain room in a coffee-house, expels therefrom the plaintiff's servant, in derogation of the plaintiff's right of occupation. The defendant is liable to the plaintiff in damages; since an action of ejectment for restoration to possession would lie.³

Whatever amounts to, or if persisted in might amount to, an effectual privation of the associate tenant of participation in the possession of the common property amounts to an ouster, even though there be no actual expulsion or withholding of possession from him. For example: The

¹ It is difficult to find judicial authority for this example, because, perhaps, of its simplicity. Its correctness is clear.

² *Filbert v. Hoff*, 42 Penn. St. 97.

³ *Murray v. Hall*, 7 Com. B. 441; s. c. *Bigelow's L. C. Torts*, 343. Ejectment was originally an action of trespass, and is considered still to include trespass. Hence, if that form of remedy may be used, trespass lies. This is the reasoning; but it is difficult to see how ejectment could be allowed a cotenant.

defendant, cotenant with the plaintiff of a certain close, digs up the turf and carries it away, without the plaintiff's consent. This is an ouster, for which the defendant is liable to the plaintiff in damages; since, if the cotenant were permitted to take the turf, he would be entitled to dig away the soil below the turf, and might thus effectually deprive his fellow of his right to the possession.¹

If the criterion of this remedy between cotenants for an ouster be the question whether an ejectment would be maintainable, it follows that an action for trespass in respect of *goods* held in common cannot be maintained by one cotenant against another; for an action of ejectment lies for the recovery of land only. Nor, indeed, is there any authority in opposition to this deduction; the question of the right of action having, so far as the reported authorities go, always arisen in regard to common rights in realty.² Some decisions have denied the remedy even when resorted to in cases of real property.³

In respect of personal property, however, it will be seen in the next chapter that an action for the conversion of the common chattel can be maintained in certain cases. The difficulty thus relates more to the technical form of action than to the substance of things. It may therefore be laid down, that for one tenant in common of personal property to withhold possession of the chattel from his associate, or to expel him from participation in the

¹ *Wilkinson v. Haygarth*, 12 Q. B. 837. The defendant would not have been liable to an action for *trespass* for taking and carrying away the growing grass or crops. *Ib.* The Statute of 4 Anne, c. 16, § 27, in force in this country where not superseded by other legislation, gives a remedy by account where the defendant has taken all, or more than his share, of the profits. See *Silloway v. Brown*, 12 Allen, 30, 38.

² See the cases cited in Bigelow's *L. C. Torts*, pp. 358-360.

³ *Wait v. Richardson*, 33 Vt. 190. See also *Bennet v. Bullock*, 35 Penn. St. 364, 367.

possession, or to appropriate to himself more than his share of the profits arising from the property, is a breach of legal duty to the latter, for which the law gives redress.¹

It has been observed that, in order to maintain an action for trespass to land, possession of the land at the time of the wrongful entry is necessary. But the law does not allow a person who has wrongfully entered, to take and enjoy the profits of the close, or to commit depredations upon the premises during his occupancy, without a reckoning. If the owner or person entitled to the possession subsequently obtain possession of the close, the law treats him, by the fiction of relation, as having been in possession during all the time that has elapsed since he was ejected from the premises.

The consequence is, that upon his re-entry he becomes entitled to sue for the damage which he has sustained at the hands of the party who has usurped the possession. The remedy thus allowed is called an action for mesne profits; that is, for the value of the premises during the period in which the plaintiff has been kept out of possession by the defendant. The plaintiff is also entitled to recover for all wrongful entries upon and damages done to his property in the mean time.² For example: The defendant enters upon premises of the plaintiff, of which the plaintiff has been disseised, and removes buildings therefrom. The plaintiff subsequently re-enters, and then brings suit

¹ The difficulty in the way of the common-law action of trespass is that the defendant, tenant in common, had a right of possession, and that is inconsistent with that form of action. But in an action of trover for the conversion of a chattel, it matters not that the defendant had a right of possession. The gist of such an action is not (as it is in trespass) the wrongful possession of the defendant, but the conversion of the plaintiff's right.

² *Liford's Case*, 11 Coke, 46, 51; *Morgan v. Varick*, 8 Wend 587; *Dewey v. Osborn*, 4 Cowen, 329, 339.

for damages done to his property. He is entitled to recover.¹

There is much conflict as to the existence in the disseisee of a right of action for mesne profits against one who, before the plaintiff's entry, had succeeded the disseisor by descent or purchase; that is, in the language of the law, against a stranger. On the one hand, it is said that to take a supposed title from another cannot be a trespass, and therefore mesne profits arising during the latter's occupation cannot be recovered of him.² On the other hand, the apparent injustice of this doctrine, towards the owner, has been urged, and the contrary conclusion reached.³ Between the extremes of these rulings, however, there is an important class of cases, as to which there is little conflict. These are cases in which the defendant claims under one who has been let into possession under legal process. In cases of this kind, it has been held that the defendant is not liable for mesne profits; and it seems just, as well as conformable to the doctrine of trespass upon lands, that one who has obtained possession under the disseisor by process of law should be presumed by third persons to be rightfully possessed while the process (and the possession by virtue of it) continues in force. For example: The defendant enters and occupies land of the plaintiff under a writ of possession, executed against one who had wrongfully disseised the plaintiff. The writ is afterwards set aside, and the plaintiff resumes possession. The defendant is not liable for the profits consumed during his occu-

¹ *Dewey v. Osborn, supra*. This case shows also that the party on re-entry is in a position to sue for every entry upon his lands made without authority.

² *Liford's Case*, 11 Coke, 46, 51; *Barnett v. Guildford*, 11 Ex. 19, 30; *Case v. De Goes*, 3 Caines, 261, 263; *Van Brunt v. Schenck*, 10 Johns. 377, 385; *Dewey v. Osborn*, 4 Cowen, 329, 338.

³ *Morgan v. Varick*, 8 Wend. 587.

pancy.¹ Again: The defendant enters and takes possession of the plaintiff's land under a license from one who has been put into possession against a wrong-doer under a writ of restitution, which writ is afterwards quashed. The defendant is not liable for the mesne profits.²

It would seem also that purchasers, third persons, under judicial sales, would stand in a like situation; for, though they do not acquire title from parties let into possession under legal process, they take through the sheriff, who may reasonably be presumed to have authority to sell. And there is judicial authority for this view.³ It would (probably) be otherwise if the purchaser should be the person who had instituted the invalid proceedings under which he was let into possession.⁴

The non-liability of the purchaser or heir extends, however, only to profits consumed by him. If such person sow the land, or cut down trees, or grass, or crops, and sever and carry them away, or sell them to another, the disseisee, after regress, may take the things severed wherever he can find them, or, if he cannot find them, recover their value of the person lately in possession. The regress of the disseisee has relation to the beginning of the last occupation, and the title to the things severed is therefore in him, which the carrying away and disposing of do not divest.⁵

When the owner regained possession through an action at law, it was formerly necessary to bring a separate action for the profits of the wrongful occupation, since damages were not recoverable in an action to recover possession of

¹ Bacon v. Sheppard, 6 Halst. 197.

² Case v. De Goes, 3 Caines, 261.

³ Dabney v. Manning, 3 Ohio, 321.

⁴ See, further, Bigelow's L. C. Torts, 362-366.

⁵ See Liford's Case, *supra*. But, of course, if the owner take away the things severed, the defendant can recoup their value in trespass for the mesne profits. *Ib*.

the land. More recently, however, statutes have been quite generally passed authorizing and requiring the plaintiff to claim his damages in the proceeding for the land, and barring any other claim therefor.¹ But these statutes do not affect the party's right of action when he has acquired possession again without process of law;² though it is still necessary for the disseisee to have regained possession before he brings his suit.³

§ 3. OF WHAT CONSTITUTES A TRESPASS TO PROPERTY.

The gist of an action for trespass to land consists in the wrongful entry upon it. And any entry upon land in the rightful possession of another, without license or permission, is a breach of duty to the possessor; and this, too, though the land be unenclosed. It follows that an action is maintainable for such an entry, though it be attended with no damage to the possessor. For example: The defendant without permission enters upon unenclosed land in the lawful possession of the plaintiff, with a surveyor and chain carriers, and actually surveys part of it, but without doing any damage. The act is a breach of duty to the plaintiff, and the defendant is liable at least to nominal damages.⁴

The same is true though the close entered be a private way, over which the plaintiff has a right of passage, and the defendant has not; though the plaintiff has no right to the soil.⁵ For example: The defendant deposits articles at

¹ *Raymond v. Andrews*, 6 Cush. 265; *Leland v. Tousey*, 6 Hill, 328.

² *Leland v. Tousey*, *supra*.

³ He can maintain an action of trespass for the original ouster before a re-entry, since he was in possession when first ousted. *Case v. Shepherd*, 2 Johns. Cas. 27.

⁴ *Dougherty v. Stepp*, 1 Dev. & B. 371. Should the defendant repeat the offence, he may be made to smart for it in damages. *Williams v. Ealing*, 4 Barr, 486.

⁵ The action is case, not trespass.

various times in a passage-way to the use of which he has no right, and the plaintiff has a right, though the ownership of the soil is in another. The defendant is liable; though he removes the articles in every instance before the plaintiff desires to pass out, and never in fact hinders the plaintiff in entering or in going out of the passage.¹

A close is deemed to have been broken and entered even though the act was not in fact committed within it, but only against its bounds. To bring any thing against such bounds without permission is a trespass. For example: The defendant, without permission, drives nails into the outer wall of the plaintiff's building, which stands upon the line of the plaintiff's premises. This is a breach of duty, for which the defendant is liable in damages.² Again: The defendant heaps up dirt close to the plaintiff's boundary wall, and the dirt, of itself, falls against the wall. This is a trespass.³

An entry upon land, or a taking of goods, is justifiable when effected (1) either by consent of the party or (2) by license of the law. The term "consent of the party," as here used, has reference to an express consent, either in answer to a request for permission, or by specific invitation or request by the possessor. Cases of this kind sufficiently explain themselves, and need not be dwelt upon. The term "license of the law," as here used, includes all other cases in which the entry or taking possession was lawful.

This second class needs some explanation. The law licenses an entry upon the land of another, or the taking possession of another's goods, in at least ten classes of cases. The first in importance of these classes is where the law has commanded the entry or the taking posses-

¹ Williams v. Esling, 4 Barr, 486; s. o. Bigelow's L. C. Torts, 371.

² Lawrence v. Ober, 1 Stark. 22.

³ Gregory v. Piper, 9 Barn. & C. 591.

sion; the entry and levy of a sheriff by virtue of a valid precept being a good example.

The second of these classes is where an entry is made into an inn, or into a shop, store, or warehouse on business, or into the coach of a common carrier of passengers. Such an entry is lawful if the party be in a fit condition to be received.

The third class of cases is where the party in possession of land has bound himself by debt to another, without any stipulation as to the place of payment. In such a case, the creditor is allowed by law to enter his premises for the purpose of demanding payment.¹

The fourth of these classes is where the party in possession has assumed a relation of trust over the real property of another. In such a case, the law allows the latter to make an entry upon the land for the purpose of ascertaining whether his interests are properly regarded by the possessor. For example: The defendant leases land to the plaintiff, and subsequently enters to see if the latter has committed waste. This is no breach of duty to the plaintiff.² Again: The defendant leases land to the plaintiff, reserving the right to the use of certain trees. He afterwards enters to point out the trees intended. This is not a breach of duty.³

The fifth class is where goods have been sold which lie upon the premises of the vendor. In the absence of any special agreement or general custom concerning the delivery of the goods, the buyer may go upon the premises of the seller and take them.⁴ A license is implied in this case because it is necessary to carry the sale into effect, and it cannot be revoked. This, however, would not be true of the case of a sale of things (such as trees) that must be severed from the realty to convert them into per-

¹ 3 Black. Com. 212.

³ Newkirk v. Sabler, 9 Barb. 652.

² 3 Black. Com. 212.

⁴ McLeod v. Jones, 105 Mass. 403.

sonalty. The implied license to enter and sever in this case, if there be any, may, it is said, be revoked before the entry.¹

The sixth class is where the possessor of land has wrongfully burdened another with the possession of his (the former's) goods. In such a case, the goods may be taken and put upon the owner's premises; and neither the taking of the goods, nor the entry upon the owner's premises is unlawful. For example: The defendant takes an iron bar and sledge belonging to the plaintiff, and puts them upon the plaintiff's land; the plaintiff having first brought them upon the defendant's premises, and then, without permission, having left them there. The entry is lawful.²

The seventh class is where a man's goods, without his act, have got upon the land of another. In such a case, the owner of the goods may enter and take them. For example: The defendant enters upon the plaintiff's land to get apples, which, by the action of the wind, have fallen from the trees into the latter's close. The defendant is not liable.³ Again: The defendant enters upon the plaintiff's land to get his own goods which the plaintiff has wrongfully taken and put there. This is lawful;⁴ though it would have been otherwise had the plaintiff come properly into possession of the goods.⁵

The eighth class is where a person enters the premises of another to succor his beast in danger of perishing. Such an act is not a trespass; but it is said that the case would be different if the entry was made to prevent a person from stealing the owner's beast, or to prevent

¹ McLeod v. Jones, *supra*.

² Cole v. Maundy, Viner's Abr. Trespass, 516.

³ Millen v. Fawdry, Latch, 120. It would be otherwise if the defendant should shake the trees. Bacon's Abr. Trespass, F.

⁴ Viner's Abr. Trespass, 1 (A); Bigelow's L. C. Torts, 382.

⁵ Bigelow's L. C. Torts, 381.

cattle from consuming his corn.¹ The distinction made between the cases is that in the former case the loss of the animal would be irremediable, that is, that particular animal (which might be very valuable) could not be replaced; while in the latter case, the animal might be recovered from the thief, or the corn replaced by purchase or by a new crop; all corn being substantially alike. The distinction, however, appears mediæval.

The ninth class of cases is where the defendant brings or suffers a nuisance upon his premises, to the peculiar injury of his neighbor. In a case like this, the latter may, at common law, enter and abate the nuisance. For example: The defendant enters upon the plaintiff's premises, and removes the eaves of a shed, which overhang the defendant's land and in rainy weather drip upon his premises. This is no breach of duty to the plaintiff.²

The tenth class of cases is where an entry has been made upon land of another by reason of necessity, without the fault of the person entering. Such an entry is justifiable. For example: The defendant runs into the plaintiff's premises to escape a savage animal, or the assault of a man in pursuit of him. The defendant is not liable.³ Again: The defendant enters upon the plaintiff's premises to pass by a portion of the highway which at this point is wholly flooded, but without the act of the defendant. The entry is justifiable.⁴

In all of the foregoing cases, the entry must have been peaceably made, and without doing unnecessary damage, and any damage done should (probably) be paid for or repaired.⁵

¹ Bacon, *ut supra*.

² Penruddock's Case, 5 Coke, 100 b; Bigelow's L. C. Torts, 383, where various distinctions as to such cases are mentioned.

³ Year Book, 37 Hen. 6, p. 37, pl. 26.

⁴ Absor v. French, 2 Show. 28.

⁵ See Chambers v. Bedell, 2 Watts & S. 225.

The effect of purchasing and taking property from one who had no title or right to sell has been a subject of conflict of authority. The act is treated by some of the courts as a trespass to the owner, rendering the purchaser liable to an action without any demand for the goods.¹ By other courts, it is held that the act cannot be a trespass before a refusal to surrender the property on demand made;² though it is said by the same courts that no demand would be necessary if the purchaser took the goods away from the seller without a delivery to him.³

It has already been seen that a trespass to property consists in an unlawful entry of land or taking of goods, and a trespass by imprisonment, in an unlawful arrest. There is one case, however, in which, by reason of subsequent acts, a person may be treated as a trespasser notwithstanding the lawfulness of the entry or taking possession, or of the arrest; the result thus being to deprive the party of the justification of the lawfulness of the original act, and, by a fiction of law, to make him a trespasser *ab initio*. According to this fiction, one who has taken possession of goods, or entered upon land by virtue of a license of the law, becomes a trespasser *ab initio* (notwithstanding the lawfulness of the levy or entry), if he afterwards, while acting under the license, commit an act which in itself amounts to a technical trespass. For example: The defendant enters upon the plaintiff's premises by virtue of a valid writ, commanding him to levy upon the plaintiff's goods. He then puts a keeper, who is intoxicated, upon the latter's premises to take care of the goods, against the plaintiff's remonstrance. The bringing such a person upon

¹ Stanley v. Gaylord, 1 Cush. 536; Galvin v. Bacon, 2 Fairf. 28; Hyile v. Noble, 13 N. H. 494.

² Marshall v. Davis, 1 Wend. 109; Nash v. Mosher, 19 Wend. 431; Pierce v. Van Dyke, 6 Hill, 613.

³ Nash v. Mosher, *supra*.

the premises is a trespass, and the defendant is a trespasser from the beginning.¹

But, in order to become a trespasser *ab initio*, the subsequent act must, it has been held, be a technical trespass: if it be not, the party is not to be treated as a trespasser from the beginning, though the act committed be wrongful and subject him to liability. For example: The defendant, an officer, enters upon the plaintiff's premises by virtue of a lawful writ, to make a levy for debt. While there, in the course of his business as an officer, he wrongfully extorts money from the plaintiff. He is not a trespasser from the beginning of his entry, though the extortion was a breach of duty for which he would be liable in damages; extortion not being a trespass.²

These examples, on examination, will show the importance of the doctrine of trespass *ab initio*. If the person's conduct make him obnoxious to this doctrine, it follows (probably) that all acts done, such as, in the case of an officer, levies made, intermediate the entry and the trespass, are void; since, his entry being a trespass, he could not, according to general principles of law, thereafter do an act against the will of the occupant which would be legal.³ Besides, he would be liable for the entry as well as

¹ *Malcolm v. Spoor*, 12 Met. 279; s. c. *Bigelow's L. C. Torts*, 378.

² *Shorland v. Govett*, 5 Barn. & C. 485; *Adams v. Rivers*, 11 Barb. 390. But compare *Holley v. Mix*, 3 Wend. 350.

³ Compare *Ilsley v. Nichols*, 12 Pick. 270; *Bigelow, Fraud*, 165. *Ilsley v. Nichols* decides that a levy made by breaking open the outer door is invalid, and the officer is liable for the value of the goods taken as well as for the unlawful entry. The same result should in principle follow if, by an act subsequent to the entry, he become a trespasser from the beginning. The doctrine of trespass *ab initio* is put upon the ground that the subsequent act indicates a prior purpose to commit a trespass. *Six Carpenters' Case*, 8 Coke, 146; *L. C. Torts*, 386. If a sheriff should levy upon a horse, and then (the horse being well) intentionally poison him, it would be a fair inference that he intended the trespass from the beginning.

the after-acts. The doctrine does not, therefore, concern the form of remedy alone.

This doctrine of trespass *ab initio* applies, however, only against persons who have entered or taken goods by license of law. A person cannot treat as a trespasser from the beginning one to whom he has himself given permission to enter or take his goods, whatever be the nature of his subsequent acts. For example: The defendant, by permission of the plaintiff's wife, enters the plaintiff's house in his absence, and while there wrongfully gets possession of papers, and carries them away. This does not make him a trespasser *ab initio*.¹

As the subsequent act must amount to a trespass, it becomes necessary to ascertain somewhat precisely the technical signification of the term. It is difficult to define a trespass, but the following will serve to indicate the proper meaning of the term: (1) Any wrongful contact with the plaintiff's person or property is a trespass. (2) Any wrongful act committed directly with force is a trespass, though no physical contact with the person of the plaintiff or with his property be produced; as in the case of an imprisonment without contact, or the firing a gun under the plaintiff's window, to the alarm of the inmates of his house. In cases like these, force is said to be implied. Upon the same ground, the debauching of the plaintiff's wife, daughter, or servant, might be considered as a trespass, and the act has sometimes been so treated by the courts: ² the consent given was not the plaintiff's consent. But the later view is different.³

¹ Allen v. Crofoot, 5 Wend. 556. It is not clear that the subsequent act in this case was a trespass; but, supposing it to have been such, the defendant still would not have been a trespasser from the beginning. Six Carpenters' Case, 8 Coke, 146.

² Tullidge v. Wade, 3 Wils. 18; 1 Chitty, Pleading, 126, 133.

³ Macfadyen v. Olivant, 6 East, 387. Chitty, however, prefers the old doctrine. 1 Pleading, 133.

On the other hand, (1) a mere non-feasance (that is, a pure omission) cannot be a trespass;¹ (2) nor can there be a trespass where the matter affected was not tangible, and hence could not be immediately injured by force, as in the case of an injury to reputation or health; (3) nor can there be a trespass where the right affected is incorporeal, as a right of common or way; (4) nor where the interest injured exists in reversion or remainder, and is not in possession; (5) nor where there is no right of action immediate upon the act in question.²

Lastly, to constitute a trespass to property, the thing affected must, though tangible, be capable of ownership as property. Wild animals, untamed, are deemed property only while in the actual or constructive possession of the keeper; upon effectual and final escape, they cease to be property, and may be killed, or taken and retained by any one, at least if he is not aware of the prior ownership. And a wild, savage animal straying at large may be killed, though the owner be known to be in pursuit.³

A man may have property in a dog, though the animal may not have any ascertainable pecuniary value.⁴ And the same is doubtless true of other animals kept as pets, and of wild animals which have been tamed.⁵ It follows that no one has an *absolute* right to take and keep them when found straying,⁶ or to kill them.⁷ But while there is no absolute right to kill such animals, there are circumstances when the law will justify such an act. A man may protect himself or another from the attack of a beast, and he may kill a dog at large doing or attempting to do

¹ Six Carpenters' Case, 8 Coke, 146.

² See 1 Chitty, Pleading, 166.

³ 2 Kent, Com. 348, 349.

⁴ Dodson v. Meek, 4 Dev. & B. 146; Wheatly v. Harris, 4 Sneed, 468.

⁵ Amory v. Flynn, 10 Johns. 102.

⁶ *Ib.*

⁷ Dodson v. Meek, and Wheatly v. Harris, *supra*.

mischief, as in biting or worrying sheep or other domestic animals.¹ A ferocious, biting dog, suffered to run at large without a muzzle, is a common nuisance, and any one may kill it, whether at the time it was doing mischief or not, or whether the owner knew of the nature of the dog or not.²

A man may, however, keep a ferocious dog as a watch over his premises, if properly secured; and while it is in such a situation, and has made no attack upon any one, it is not lawful to kill it.³

Nor will the mere fact that another's domestic animals are found trespassing upon a man's premises justify him in killing them,⁴ or in detaining them upon a claim for any thing beyond reimbursement for necessary expenses, and payment of the actual damage done. If detained, they must be properly treated, and not injured.⁴ If the owner of the premises drive them out, he must do so without unnecessary violence; otherwise he will be liable. For example: The defendant, finding the plaintiff's horse to have strayed upon his premises, sets a ferocious dog upon it, and seriously injures it. This is a violation of duty to the plaintiff, and the defendant is liable for the damage.⁵

¹ *Brown v. Hoburger*, 52 Barb. 15; *King v. Kline*, 6 Barr, 318; *Woolf v. Chalker*, 31 Conn. 121.

² *Putnam v. Payne*, 13 Johns. 312; *Maxwell v. Palmerston*, 21 Wend. 407; *Brown v. Carpenter*, 26 Vt. 638.

³ See *Perry v. Phipps*, 10 Ired. 259.

⁴ *Murgoo v. Cogswell*, 1 E. D. Smith, 359.

⁵ *Amick v. O'Hara*, 6 Blackf. 258.

CHAPTER IX.

CONVERSION.

§ 1. INTRODUCTORY.

Statement of the duty. A owes B the duty to forbear to exercise dominion (1) over the latter's general property in personal chattels; or (2) over his special property in the like things.

OBSERVATIONS.

1. By "general property" is meant such an ownership of the goods as will suffice to pass a good title thereto.

2. By "special property" is meant a right of possession not amounting to general property.

3. By "bare possession" merely is meant a possession unlawfully obtained.

4. The action for converting property is commonly called "trover," — a term meaning "to find," which was used in the old precedents of declaration; the plaintiff, by means of a fiction, alleging that he had lost and the defendant had *found* and converted to his own use the chattel in question.¹

5. The action of trover is an action to recover (not specific articles, but) damages for the conversion of chattels personal, or movable goods, to the value of the interest converted.

6. By an "act of dominion" is meant an act tantamount to an exercise of ownership.

7. The action of detinue has become nearly if not quite

ⁱ The allegation was at first probably real, arising perhaps from the common action for strays.

obsolete in this country. Its object is to recover chattels *in specie*, and not damages apart from the recovery of the chattels. It has been superseded by replevin and trover.

8. The action of replevin seeks to recover chattels personal *in specie*, wrongfully withheld. It is much regulated by statute, and presents features not altogether alike in the different States. Its various statutory phases cannot be examined in the present work.

9. As in trespass, so in trover, detinue, or replevin the thing alleged to have been converted must be capable of ownership as property.¹

§ 2. OF POSSESSION.

The possession of a chattel personal, that is, of a movable article, or the right of possession thereof, is necessary to support an action for conversion, just as has been seen to be the case with an action for trespass. The plaintiff fails in trover if it appear that he has parted with his right of possession, and has not before suit become reinvested with that right. For example: The defendant, a sheriff, wrongfully levies upon goods of the plaintiff in the hands of a lessee of the property, and carries the goods away. The plaintiff cannot treat the act as a conversion, though the tenant could, since the plaintiff was not entitled to the possession of the property.²

On the other hand, the right of possession of the chattels is sufficient to enable the general owner to sue for a conversion thereof, though he have not the actual possession at the time of the wrongful act; because, as was stated in the preceding chapter, the ownership of goods draws to the owner the possession, in contemplation of law. For example: The defendant buys a chattel belonging to the plaintiff from A, who had no right to sell it. The plaintiff, being

¹ See *ante*, p. 182.

² *Gordon v. Harper*, 7 T. R. 9.

the owner, is deemed to have been in possession of the chattel at the time of the conversion by the defendant.¹

A person having the special property of goods in his rightful possession can maintain an action for conversion against all persons who may wrongfully take the goods from him, though the act be done by command of the owner of the goods. For example: The defendant takes a horse out of the possession of the plaintiff, the plaintiff having a lien upon the animal. The defendant acts by direction of the owner, but without other authority. He is liable for the conversion of the horse.²

It follows that a person in the rightful possession (actual or legal) of goods, in which he has a special property, may maintain an action against the owner himself for any unpermitted disturbance or refusal of his possession; since, if the owner cannot give an authority to another to take the goods, he cannot take them himself. For example: The defendant, owner of a title-deed, in the possession of the plaintiff under a temporary right to hold it, takes it by permission of the plaintiff for a particular purpose, and then, during the continuance of the plaintiff's right to hold it, refuses to redeliver it. The defendant has violated his duty to the plaintiff, and is liable for the conversion.³

One who has but a possession of chattels, though without a right to hold them against the owner, is also protected against all persons having neither a right of property nor of possession. The mere fact that the possessor of goods has no right to hold them, as against persons having a general or higher special property in the goods, gives no privilege to a stranger to interfere with the party's possession. So to

¹ *Hyde v. Noble*, 13 N. H. 494; *Clark v. Rideout*, 39 N. H. 238; *Carter v. Kingman*, 103 Mass. 517.

² See *Outcalt v. Durling*, 1 Dutch. 443. The form of action in this case was trespass, but it might as well have been trover. The injured party can sue in either form in such cases.

³ *Roberts v. Wyatt*, 2 Taunt. 268.

interfere would be a breach of duty to the possessor which would render the person interfering liable for the value of the goods. For example: The defendant, a stranger, refuses to return to the plaintiff a jewel, which the latter has found and shown to the defendant. The defendant's act is a breach of duty to the plaintiff, and he is liable for the value of the jewel.¹

It would be different, however, if the defendant acted under express authority of the owner, or of one entitled to the possession of the property. But, according to the prevailing doctrine, the defendant could not set up the rights of a third person (the *jus tertii*) without authority from the latter.² That is, the defendant can deny the plaintiff's right only by showing a better right in himself.³ And the same rule prevails in an action of replevin for the specific goods.⁴

In order, however, that possession should confer the right to sue in trover or replevin, the possession must, as in an action for trespass, be rightful for the time, though subject to be defeated by the claim of one who has a superior right of property. In other words, a person who has acquired possession of goods unwarrantably, whether by theft or by fraud, force, or violence, or otherwise, without title or right, cannot maintain an action of trover or replevin for the detention of the goods even against one who has taken them away from him in a like or any other manner.⁵ For example: The defendant takes goods belonging to himself out of the possession of the plaintiff, a

¹ *Armory v. Delamirie*, 1 Strange, 505; s. c. Bigelow's L. C. Torts, 388.

² *Rogers v. Arnold*, 12 Wend. 30; *Jefferies v. Great Western Ry. Co.*, 5 El. & B. 802; *Cheesman v. Exall*, 6 Ex. 341; Bigelow's L. C. Torts, 426; 1 Smith's L. C. 650-653 (7th Am. ed.).

³ *Hubbard v. Lyman*, 8 Allen, 520; *Landon v. Emmons*, 97 Mass. 37.

⁴ *Rogers v. Arnold*, *supra*.

⁵ See *ante*, p. 164; *Buckley v. Gross*, 3 Best & S. 566.

sheriff, who had seized the goods as the goods of P. The act is no breach of duty to the plaintiff.¹

In order to confer a right upon the finder of goods, he must therefore have taken possession in good faith, and not feloniously, — with a purpose of returning the property to the owner upon his appearance and proof of property.

The finding of a chattel does not, however, in all cases give a right to hold the article against all persons having no right of property in it; though the finding and taking possession were not unlawful as against the loser. The chattel may be found upon the premises of another, in such a situation as to indicate that it was voluntarily placed in possession of the owner of the premises. When this is the case, the possession of the article is deemed to be in the occupant of the premises, and not in the finder. The former can therefore maintain trover or replevin against the latter, should he refuse to surrender to him the chattel. For example: The defendant, a barber, receives from the plaintiff, a customer in his shop, a pocket-book containing money, which the plaintiff has discovered lying upon a table in the defendant's shop. The plaintiff, in handing the pocket-book to the defendant, tells him to keep it until he can discover the owner, and then return it to the loser. No one having called for the article, the plaintiff claims it, and the defendant refuses to give it to him. This is not a breach of duty to the plaintiff, since the fact that the pocket-book was left upon the defendant's table indicates that the owner put it there by a voluntary act, and so put it into the defendant's custody.²

If, however, the chattel be found in a position which indicates that it could not have been voluntarily placed there, but must have been unintentionally parted with, and so truly lost the moment it escaped the owner, it does not

¹ *Kemp v. Thompson*, 17 Ala. 9.

² *McAvoy v. Medina*, 11 Allen, 548.

fall into the custody and possession of the occupant of the premises unless he (or his servant) first discover it there. If another first find it, the possession, as between himself and the occupant, is in him, the finder. For example: The defendant, a shop-keeper, receives from the plaintiff a parcel, containing bank-notes, which the latter has picked up from the *floor* of the defendant's shop; the plaintiff, on handing the parcel to the defendant, telling him to keep the same till the owner claims it. The defendant advertises the parcel, but no one claims it, and three years having elapsed, the plaintiff requests the defendant to return to him the bills, at the same time tendering the cost of advertising, and even offering an indemnity. The defendant refuses. This is a breach of duty to the plaintiff, and the defendant is liable to him for the conversion of the parcel.¹

A servant, when not a bailee, is considered incapable of having possession of his master's goods for the purposes of an action of trover or replevin: the possession is the master's. For example: The defendant takes goods out of possession of the plaintiff, a sheriff's deputy, without authority. The act is deemed not a breach of duty to the plaintiff, since he is but a servant; though it would be otherwise as to the sheriff.²

§ 3. OF WHAT CONSTITUTES CONVERSION.

It has been seen that conversion consists in the exercise of an act of dominion over the movables of another. There are two classes of acts of dominion; first, where the wrong-doer appropriates to himself the goods of another; secondly, where, without appropriating them

¹ *Bridges v. Hawkesworth*, 21 Law J. Q. B. 75; s. c. 7 Eng. Law & Eq. 424.

² *Hampton v. Brown*, 13 Ired. 18; *ante*, p. 164. See, however, *Mathews v. Harsell*, 1 E. D. Smith, 393.

to himself, he intentionally deprives the owner, or person having the superior right, of their use.

The most common illustration of an act of dominion of the first class is the case of a sale of goods, made without authority of the owner. Every sale without restriction by a person having no right to sell is a conversion, and renders the vendor liable in an action of trover. For example: The defendant, an officer, levies upon goods as the property of a third person, some of which belong to the plaintiff, takes them away, after being informed of the plaintiff's claim, and sells the whole. This is a conversion of the plaintiff's goods; though it would have been otherwise had the goods been fraudulently mixed by the plaintiff with those of the third person,¹ and a separation not offered by the plaintiff.²

The same consequence follows where, having a right to make a sale the party selling transgresses his right; since to do so is to assert that he may sell according to his own will, and that is to exclude the rights of all others. For example: The defendant, mortgagor of a horse, of which he has remained in possession by consent of the plaintiff, the mortgagee, sells the same absolutely. This is a conversion, and the defendant is liable, though he might have disposed of his own interest in the property.³ Again: The defendant, an officer, makes, unnecessarily, an excessive levy upon the plaintiff's goods, under a valid writ, and sells them. This is a conversion, since it is done in disregard of the defendant's authority, and therefore by the party's own will.⁴

This principle that the sale of property is an act of dominion so as to render the seller liable for conversion if he had no right to sell as he did, applies equally whether the vendor knew or did not know the true state of the

¹ *Gilman v. Hill*, 36 N. H. 311. ² *White v. Phelps*, 12 N. H. 382.

³ See 2 Kent Com 365.

⁴ *Aldred v. Constable*, 6 Q. B. 381.

title, or the actual limit of his authority. Liability for converting the goods of another to one's own use does not depend upon the intent of the party exercising the act of dominion. For example: The defendant sells a horse of the plaintiff to a third person, the defendant having bought the animal from one who had no title to it, though the defendant supposed the contrary, and supposed himself to be owner of the horse at the time of the sale in question. The sale by the defendant is a conversion.¹

The purchaser, though he buy without notice, is also guilty of a conversion, at least upon a refusal to deliver the goods to the owner;² unless the latter facilitated the purchaser's act and mistake.³ There is conflict of authority, however, whether the mere purchase by an innocent party can alone amount to a conversion, — a point to be adverted to again, hereafter.

This supposes, however, that the vendor had no such title as would justify him in making an absolute sale. If he have for the time the ownership of the goods, even though his title was defeasible, a purchaser for value, without notice that the title is liable to defeat, acquires the property by his purchase, and cannot therefore be guilty of a conversion by refusing to restore the goods to the person who had the right to defeat his vendor's title.

Such would be the case where the purchaser's vendor had acquired his title from the plaintiff by means of a sale effected by false and fraudulent representations. Fraud of this character renders the sale voidable merely, and not void; and the consequence is, that the defrauded party has a right to set aside the sale so long as the property remains in the hands of the buyer from himself, or of any one claim-

¹ *Harris v. Saunders*, 2 Strobb. Eq. 370, note; *Carter v. Kingman*, 103 Mass. 517.

² *Hyde v. Noble*, 13 N. H. 494; *Clark v. Rideout*, 39 N. H. 238; *Clark v. Wilson*, 103 Mass. 219.

ing under him who is not a *bona fide* purchaser for value. But inasmuch as the buyer, notwithstanding his fraud, acquired the title to the goods, he can convey that title; and more, he can convey a better right than he had himself, provided he sell to a *bona fide* purchaser for value. Hence, not only would the latter be free from liability in refusing to return the goods to the defrauded party, but should such party obtain possession of them and refuse to deliver them to the purchaser from the intermediate seller, he (the defrauded party) would himself be liable in trover. For example: The defendants, having previously been owners of a quantity of iron, sell the same to P., who gives them a fraudulent draft (supposed by the defendants to be good) for the amount due for the property. P. then sells the iron to the plaintiff, who buys for value, and without notice of the fraud. Subsequently, the defendants discover the fraud, and send their servant to take away the iron, now lying in port in a lighter alongside the plaintiff's wharf. The servant takes away the lighter and brings the iron therein to the defendants. The plaintiff has acquired a good title to the iron, and the defendants are guilty of a conversion.¹

There are other cases in which a person may by purchase for value and without notice acquire a better title than his vendor had. A purchaser of goods from one who has by the terms of sale reserved the right to buy back the property within a certain time, acquires (or may by such a transaction acquire) the title to the property, and having a good title, he may convey the same to one who purchases for value and without notice so as to cut off the original owner's right to repurchase. The consequence is, that the last purchaser is not guilty of a conversion by refusing to let the original owner have the goods upon a tender by him of the amount he was to pay for them, though made within the time agreed upon between him and his buyer. The

¹ *White v. Garden*, 10 Com. B. 919.

case would be different, however, as to the buyer from the original owner. His act in making the sale would be lawful against the seller, if the seller should never offer to repurchase; but if the seller should offer to repurchase, and tender the price, his purchaser would be bound to return to him the goods, and, in case of failure, would be liable for a conversion of them.¹

If, however, the sale were upon condition that the title should not pass until the performance of some condition, the party, not having acquired a title, could not convey one; and an attempt to do so by a sale would subject the seller to liability in trover, and the buyer also, at least, if the buyer should refuse to surrender the property to the owner. For example: The defendants purchase furniture from W., who had taken possession of the same upon an agreement that he should keep it six months, and if within that time he should pay a certain sum for it, it should be his; otherwise, he was to pay twenty-five per cent. of the price for the use. The sale to the defendants is made shortly after W. takes possession of the furniture and before payment for it. A refusal by the defendants to restore the property to the plaintiff is a breach of duty to him, and makes them liable for the value of the furniture.²

According to recent enunciations of the law of England, the holder of a pledge or pawn has such an interest in the chattel that he can dispose thereof by sale or repledge without subjecting the purchaser or repledgee to liability, and without subjecting himself thereto, except in either case upon a failure to produce the pledge or pawn upon tender of the debt to secure which the chattel was given. For example: The defendant has taken in pledge from S.

¹ See *Donald v. Suckling*, Law R. 1 Q. B. 585; s. c. *Bigelow's L. C. Torts*, 394.

² *Sargent v. Gile*, 8 N. H. 325, denying *Vincent v. Cornell*, 13 Pick. 294.

certain bonds, which the plaintiff had pledged to S. for the security of a debt smaller than the amount of the debt of S. to the defendant; the repledge being made before the maturity of the original debt,¹ and before payment or tender thereof. The refusal of the defendant to return the bonds to the plaintiff except on tender to the defendant of the amount due to S. is not a violation of duty to the plaintiff; nor would the act of S. amount to a conversion, unless upon tender of the debt due him he should fail to return the bonds.²

One who has a special property in goods may or may not be able to dispose of his interest therein, according to the nature of his interest. Not every special property is alienable. In many cases of bailment, the special objects to be effected forbid that the bailee should have an assignable interest. Such is the case (1) where the bailment is made upon a trust in the personal skill, knowledge, or efficiency of the bailee. Such is the case (2) where the bailee has a mere lien upon the goods entrusted to him. And such is the case (3) where the bailment is at will. In either of these cases, any attempt by the bailee to assign his interest in the property, followed by delivery of possession, puts an end at once to the bailment. The consequence is, that the assignee acquires no title or right, and becomes liable in trover on refusing to surrender the goods to the owner, even if not by merely taking them.³

There is, however, a large class of bailments where the trust is accompanied with other incidents than those pertaining to a simple bailment, and where there is no element of personal trust, and none of the characteristics of an estate at will; and in this class it is clear that the bailee has an assignable interest.⁴ There can be no conversion, therefore, in the act of transferring such an interest merely,

¹ That is, while the bonds were still subject to redemption by the plaintiff.

² *Donald v. Suckling*, Law R. 1 Q. B. 585; s. c. L. C. Torts, 394.

³ See *Bailey v. Colby*, 34 N. H. 29.

⁴ *Id.*

provided the assignee claims only the rights of the assignor ; because the latter, having exercised no act of dominion over the property, but having dealt simply with his own interest, did not reinvest the owner with a right of possession.

An attempt by the bailee to dispose of the goods absolutely would be different ;¹ unless he were a pledgee. For though a bailee could not, without fault on the part of the owner (by holding him out as having a right to sell absolutely), dispose of any thing beyond his own interest, the attempt to do so, followed by the overt act, would be to exercise dominion over the goods. This would defeat the bailee's right of possession, inasmuch as it would amount to a renunciation of any right subordinate to the general property of another ; and having renounced his subordinate right, the same would revert to the owner, thus putting him into position to sue for conversion.

The result would further be to enable the owner to maintain trover or replevin against the purchaser from the bailee, should the purchaser take the goods and refuse to deliver them to the owner. And on the other hand, if the owner, treating the right of the bailee as at an end, and reinvested in himself, should resume possession of the goods, he would not be liable to the purchaser. For example : The defendant, owner of two steers, sells them to Y., upon condition that the title is to remain in the defendant until Y. pays for them. Before Y. pays for the property, he sells the same absolutely, as his own, to the plaintiff, whereupon the defendant resumes possession of the animals. This is no breach of duty to the plaintiff ; since the sale by Y. was an act of dominion over the property, inconsistent with Y.'s rights, and reinvested the defendant with the right of possession.²

It is not always necessary that there should be a sale of the entire property held in order to effect a conversion of

¹ *Bailey v. Colby*, 34 N. H. 29.

² *Id.*

the whole. If the part sold be necessary to the substantially complete usefulness of the rest, a wrongful sale of such part will be a conversion of the whole. And the same is true where the thing held is held under one entire right, though the property be so severable as not to interfere with the usefulness or value of the parts: in such a case, a conversion of part by the holder is a conversion of the whole. For example: The defendant finds a raft of timber belonging to the plaintiff, lodged on a sandbar in a stream, takes possession of it, hires a person to assist him in removing part of it, and sells such person the residue, reserving to himself the part removed. This is a conversion of the whole raft.¹

The same is true where separate articles are delivered under one entire contract of bailment or lease, even though the articles be separately enumerated and valued. The bailment or lease is still indivisible in contemplation of law, and conversion of part is conversion of the whole.

If, however, separate articles be severally bailed or leased, by distinct contracts, though all be delivered and bargained for at the same time, the rule of law is different: a conversion of one of the articles or parts does not in such a case operate as a conversion of the whole.

If the owner of goods stand by and permit them, without objection, to be sold as the property of another, the purchaser acquires a good title, and is not liable in trover to the owner for a refusal to deliver them to him. For example: The defendant purchases machinery of M., the legal title to which at the time of the sale is in the plaintiffs. The machinery is sold under a levy of execution against M., and the plaintiffs, though having notice of the levy, and having repeatedly conversed about it, before the sale, with the attorney of the party who made the levy,

¹ *Gentry v. Madden*, 3 Pike, 127. But compare *Philpot v. Kelley*, 3 Ad. & E. 106, 117.

never lay any claim to the property until after the sale. The defendant's refusal to surrender the machinery to the plaintiff is not a breach of duty.¹

A person having an authority to sell the goods of another may also be guilty of a conversion. Such will be the case if he fail to conform, in a material particular, to the terms of his authority. For example: The defendant receipts to the plaintiff for certain shares of stock to be sold by him for the plaintiff at a commission, and, instead of selling, the defendant exchanges the stock for other property. This is a conversion.²

The case might possibly be otherwise if the act of the agent could be presumed by the purchaser to be within the general scope of his authority. In such a case the purchaser would acquire a good title to the property; and this could not occur, perhaps, where the act of the vendor was a conversion, if the effect of such an act would be to revest his rights in the owner, and thus prevent their transmission to the purchaser. The agent, however, would be liable to his principal for his misconduct in violating his instructions.³

To pledge the goods of another without authority is also a conversion; and the consequence is that the pledgee derives no right to hold the chattel, the act of the pledgor having reinvested the owner with his right of possession. For example: The defendant lends money to E., and receives by way of security a quantity of boot leather, which had been placed by the plaintiff in the hands of E. to be made up into boots, on hire. A refusal by the defendant to surrender the leather to the plaintiff is a conversion.⁴

Appropriating an article held in bailment to a use not contemplated at the time of the contract of bailment is

¹ *Pickard v. Sears*, 6 Ad. & E. 469. See *Stephens v. Baird*, 9 Cowen, 274; *Dezell v. Odell*, 3 Hill, 215.

² *Haas v. Damon*, 9 Iowa, 589. ³ *Sargeant v. Blunt*, 10 Johns. 74.

⁴ *Carpenter v. Hale*, 8 Gray, 157.

also a conversion. For example: The defendant hires of the plaintiff a horse to ride to York, and rides it beyond York to Carlisle. This is a conversion of the animal, entitling the plaintiff, on return of the property, at least to nominal damages, and to actual damages if any loss be in fact sustained by reason of the act.¹

It has sometimes been supposed that there can be no right of action in trover in such cases, unless the chattel was injured in the misappropriation.² But there is ground for doubting the correctness of this doctrine. The foundation of the action is the usurpation of the owner's right of property, — the exercise of dominion over another's chattel, — and not the actual damage inflicted.³ It is true, the plaintiff in trover seeks to recover the value of the thing converted, but if he has received it back, or if it has been tendered back in proper condition, he will be allowed to recover no more (beyond nominal damages) than the amount of his loss.⁴

In all of the foregoing cases, it will be observed that there is something more than an assertion, by word of mouth, of dominion over the chattel. An assertion alone — not followed by any act in pursuance of it, such as a refusal to surrender the chattel to the person entitled to possession — would not amount to a conversion. There must be some unauthorized interference with the plaintiff's right of possession. Even an attempted exercise of dominion, without right, appears to be insufficient to constitute a conversion, if the owner's right was not in fact interrupted. For example: The defendant, an officer,

¹ *Isaack v. Clark*, 3 Bulst. 306; *Perham v. Coney*, 117 Mass. 102.

² *Johnson v. Weedman*, 4 Scam. 495; *Harvey v. Epes*, 12 Gratt. 153.

³ *Perham v. Coney*, *supra*.

⁴ *Delano v. Curtis*, 7 Allen, 470. Judgment for the plaintiff in trover does not vest the property in the defendant. *Lovejoy v. Murray*, 3 Wall. 1; *Brady v. Whitney*, 24 Mich. 154; *Brinsmead v. Harrison*, Law R. 6 C. P. 584.

makes a declaration of attachment of goods already duly levied upon by the plaintiff in behalf of a third person, and requests a party to look after and take care of the goods, and to tell all who come there that the goods are attached. This is not a conversion, since the act has no tendency to impair or interfere with the rights of the first attaching officer.¹

When, however, the goods have been converted to the defendant's own use, the defendant is liable, though he had no intention of wrongfully interfering with the rights of another, — a proposition which has already appeared incidentally in several forms.

In the foregoing classes of cases, the defendant has appropriated the goods in question to his own use. But, as has been stated, a wrongful act of dominion may be committed without so appropriating the goods. It is enough that the defendant has intentionally deprived the plaintiff of the possession of his goods or usurped his rights over them, though for the benefit of a third person. But in these cases there must be an *intention* to interrupt the plaintiff's rights; unless the defendant be a common carrier, who is an insurer, or an agent, who is sometimes liable in trover for surpassing his instructions, as has been seen. For example: The defendant, manager of a ferry, receives on board his boat the plaintiff, with two horses. Before starting, the plaintiff is reported to the defendant as behaving improperly, and though he has paid his fare for transportation, and the defendant tells him that he will not carry the horses, and that they must be taken ashore, the plaintiff refuses to take them off the boat, whereupon the defendant puts them ashore, and has them taken to a livery for keeping. The plaintiff goes with the boat, and the next day sends to the livery stable for his horses. In reply, the plaintiff is told that he can have his horses by

¹ Polley v. Lenox Iron Works, 2 Allen, 182.

coming and paying the charges for keeping, otherwise the horses to be sold to pay expenses. They are sold accordingly, and damages as for a conversion are sought of the defendant. The action is not maintainable, since there is nothing to show that the defendant intended to deprive the plaintiff, even for a moment, of his property.¹

Any asportation of a chattel, however, *for the use* of a third person amounts to a conversion, for the reason that the act is inconsistent with the right of dominion which the owner (or person entitled to possession) has in it.² And the same is true of an intentional, or possibly negligent, destruction of the chattel.³

Demand and refusal to surrender the goods to the party entitled to them always constitute a conversion, provided only the articles in question are property. And the mere prohibition of traffic in goods which otherwise would be property does not destroy their property quality. For example: The defendant, on demand by the plaintiff, refuses to surrender to the latter intoxicating liquors (put into the defendant's hands to test, with right of purchase) after the object of the bailment has terminated. The goods are property, though traffic in them is prohibited by law, and the defendant is liable for a conversion of them.⁴

Demand of the goods, followed by a refusal to deliver them, is always necessary unless the plaintiff can establish some other act of conversion. But if any act of conversion, apart from demand and refusal, has been committed, the injured party is entitled to bring suit without first demanding his property. In other cases, a demand and wrongful refusal will be necessary, since without them there

¹ *Fouldee v. Willoughby*, 8 Mees. & W. 540. For other examples, see *Simmons v. Lillystone*, 8 Ex. 431; *Thorogood v. Robinson*, 6 Q. B. 789.

² *Fouldee v. Willoughby*, *supra*.

³ *Ib.*

⁴ *Booraem v. Crane*, 103 Mass. 522.

has been no wrongful exercise of dominion.¹ For example: The defendant collusively purchases goods from a trader on the eve of the trader's bankruptcy, and takes the property into his possession. The assignee of the trader brings trover without a demand. The action is not maintainable, since the defendant had been guilty of no conversion; the trader being competent to contract, though his contract of sale was liable to impeachment.²

Of the last example, it should be observed that (in accordance with a principle already stated) the fraud of the trader and the defendant did not make the sale void: its only effect was to render it voidable. The contract was therefore binding until disaffirmed; and a disaffirmance could be made only by a demand of the goods, or by some act tantamount thereto. And the demand and refusal, that is, the conversion, must be apart from the bringing of suit, when such acts are necessary; for the cause of action must have arisen before suit was begun. In the example given, if the defendant had sold the goods, or improperly detained them after a disaffirmance of the sale, the action would have been maintainable.³

The most common instance of the necessity of demand and refusal is where goods have been put into the hands of another for a special purpose, upon an agreement to return when the purpose is accomplished; as to which the rule is, that a breach of the contract by the mere failure so to return the goods does not amount to a conversion. Before the bailee can be liable in trover in such a case, supposing there had been no misappropriation or other act of dominion, there must be a demand for the goods and a refusal to restore them.⁴

¹ 1 Chitty, Pleading, 157; *Nixon v. Jenkins*, 2 H. Black. 135; *Gilmore v. Newton*, 9 Allen, 171; *Witherspoon v. Blewett*, 47 Miss. 570; *Hardy v. Wheeler*, 56 Ill. 152.

² *Nixon v. Jenkins*, *supra*.

³ *Bloxam v. Hubbard*, 5 East, 407.

⁴ *Severin v. Keppell*, 4 Esp. 156.

A refusal to deliver goods on lawful demand is, however, only *prima facie* evidence of a conversion.¹ The defendant may have found the goods, and refused to surrender them to the plaintiff until he shall have proved his right to them. It follows from what has already been said that such a refusal is justifiable, since, if the plaintiff is not entitled to the goods by right, the defendant as finder has the better claim; and he cannot or may not know that the plaintiff may not be a pretender until he has furnished evidence that he is not.

If the demand be not made upon the defendant himself, but merely left at his house in his absence, it seems that a reasonable time and opportunity to restore the goods should be suffered to elapse before the defendant's non-compliance with the demand can be treated as a refusal amounting to a conversion. Non-compliance with the demand after a reasonable opportunity has been afforded to obey it is, however, clearly tantamount to a refusal, and is presumptive evidence of a conversion, casting upon the defendant the burden of explaining that the omission to deliver the goods was justifiable.²

It has been a point of conflict among the authorities whether the mere taking of goods by the purchaser from a bailee who had no authority to sell, be such an act as to make the purchaser liable without a demand.³ In ordinary

¹ *Lockwood v. Dall*, 1 Cowen, 322; *Sturges v. Keith*, 57 Ill. 451; *Sargent v. Gile*, 8 N. H. 325.

² 1 *Chitty, Pleading*, 160; *Thompson v. Rowe*, 16 Conn. 71; *White v. Dewary*, 2 N. H. 546.

³ On the affirmative of the question, see *Galvin v. Bacon*, 2 Fairf. 28; *Parsons v. Webb*, 8 Greenl. 38; *Stanley v. Gaylord*, 1 Cush. 536; *Freed v. Anderson*, 10 Mich. 357; *Whitman Mining Co. v. Tittle*, 4 Nev. 494. On the negative, with some qualifications, *Marshall v. Davis*, 1 Wend. 109; *Barrett v. Warren*, 3 Hill, 348; *Nash v. Mosher*, 19 Wend. 431; *Talmadge v. Scudder*, 38 Penn. St. 517; *Sherry v. Picken*, 10 Ind. 375; *Justice v. Wendell*, 14 B. Mon. 12.

cases, the bailee's wrongful act, as has already been observed, divests him at once of his right of possession, and reinvests the bailor with such right, so that nothing can pass to the purchaser, not even a temporary right of possession; and it should follow that, if he attempt to exercise any right over the property, he would be guilty of a conversion. Indeed, it is conceded by some of the authorities which treat the mere holding of possession by the purchaser as not amounting to a conversion, that if the purchaser *took* the goods out of the possession of the bailor, upon the sale, he has committed an act of conversion; while the same authorities treat the mere receiving a delivery of the goods from the hands of the bailee as not tortious.¹

It would seem clear, however, from what has been elsewhere said, that if, without absolutely barring his rights, the bailor facilitated the act of the purchaser — contributing somewhat, by his conduct towards the goods, to cause the purchaser to suppose that the bailee had a right to sell the property, — the purchaser could not be liable without a demand.

It has also been a point of conflict of authority whether a tenant in common can maintain trover against his associate for the sale, or rather attempted sale, of the absolute property of the common chattel. Most of the American courts which have considered the subject hold such an action maintainable.² Other authorities consider that nothing short of a substantial destruction of the common

¹ *Ely v. Ehle*, 3 Comst. 506; *Nash v. Mosher*, 19 Wend. 431; *Marshall v. Davis*, 1 Wend. 109.

² *Weld v. Oliver*, 21 Pick. 559; *Wilson v. Read*, 3 Johns. 175; *Dyckman v. Valiente*, 42 N. Y. 549; *White v. Brooks*, 43 N. H. 402; *Dain v. Coning*, 22 Maine, 347; *Arthur v. Gayle*, 38 Ala. 559; *Williams v. Chadbourne*, 6 Cal. 559. The contrary is held in *Farrar v. Beswick*, 1 Mees. & W. 682; *Morgan v. Marquis*, 9 Ex. 145; *Mayhew v. Herrick*, 7 Com. B. 229; *Oviatt v. Sage*, 7 Conn. 95; *Barton v. Burton*, 27 Vt. 98; *Pitt v. Petway*, 12 Ired. 69.

property, or rather of the plaintiff's interest in the common property, is sufficient for a conversion, on the ground that each of the common tenants has a right to the entire possession and use of the goods; and, as a sale cannot at best convey a greater interest than the vendor possesses, the plaintiff cotenant continues to be a cotenant with the purchaser.¹

According to these authorities, however, it is not necessary that there should be an actual destruction of the property held in common (it is universally admitted that such an act would be a conversion), but only that the community of interest should be broken up. For example: The defendant, cotenant with the plaintiff of a horse, sells the animal absolutely to a third person and the animal is thereupon taken into a foreign jurisdiction. This amounts to a destruction of the plaintiff's interest in the chattel, and the defendant is liable for a conversion.²

There are still other decisions, not easily understood, however, which hold that trover is maintainable between cotenants for a mere withholding of the chattel, or for the misuse of it, or for a refusal to sever and terminate the common interest.³

¹ See the cases last cited.

² See *Pitt v. Petway*, *supra*.

³ *Agnew v. Johnson*, 17 Penn. St. 373; *Fiquet v. Allison*, 12 Mich. 328. See *Strickland v. Parker*, 54 Maine, 263.

CHAPTER X.

INFRINGEMENT OF PATENTS AND COPYRIGHTS.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty (1) to forbear to make, use, or vend, without B's license, a thing patented by B; (2) to forbear to print, publish, or import any copyrighted book of which B owns the copyright, or knowing the same to be so printed, published, or imported, to sell or expose to sale any copy of such book; and to forbear to violate the rights of B in respect of any other copyrighted matter of which B owns the copyright.¹

OBSERVATION.

The inquiry in the present chapter is, not what constitutes a valid patent or copyright; but, supposing the existence of such right of property, what constitutes an infringement of it.

§ 2. OF WHAT CONSTITUTES INFRINGEMENT OF PATENT.

The Revised Statutes of the United States grant to patentees, their heirs and assigns, for the term of seventeen years, the exclusive right to make, use, and vend the patented invention or discovery throughout the United States and the territories thereof;² and for an infringement they allow an action on the case in the name of the party interested, either as patentee, assignee, or grantee.³

¹ It would make the statement of this duty far too prolix to specify all of the rights and duties arising under this last clause.

² Rev. Sts. § 4884.

³ Ib. § 4919.

Infringement must therefore consist in the wrongful making, using, or vending the patented thing. But the statutes leave it to the courts to determine what constitutes a making, using, or vending.

Generally speaking, an infringement in the making takes place whenever another avails himself of the subject of the invention of the patentee, without such variation as will constitute a new discovery; or an infringement is a copy made after and agreeing with the principle laid down in the specification of the patent.¹ When a person has obtained a patent for a new invention or a discovery made by his own ingenuity, it is not in the power of any one else, by simply varying in form or in immaterial particulars the nature or subject-matter of such invention or discovery, either to obtain a patent for it himself, or to use it without the leave of the patentee. The question then is, in actions for damages for infringements of this nature, not merely whether, in form or condition such as might be more or less immaterial, that which has been done varies from the specification, but whether in reality, in substance, and in effect, the party has availed himself of the patentee's invention, in order to make the thing in question.²

It matters not therefore that the person complained of has succeeded in obtaining a patent for his supposed invention or discovery; if it be in substance and effect a copy of the plaintiff's specification and patent, he will be guilty of a breach of duty to the latter by the making, using, or vending of the subject of it, notwithstanding his letters patent.³

With regard to machines, it is often a point of difficulty to decide whether a patent is infringed, since the same elements and the same powers must be employed in all

¹ Curtis, Patents, § 289; *Calloway v. Bleaden*, Webs. Pat. Cas. 523.

² *Walton v. Potter*, Webs. Pat. Cas. 585, Tindal, C. J.

³ *Ib.*

machines. The criterion of liability is, however, easily stated: it is whether the machine complained of operates upon the same principle with the one patented. The material question must therefore be, not whether the same elements of motion or the same component parts are used, but whether the given effect is produced substantially by the same mode of operation, and the same combination of powers in both machines. Mere colorable differences or slight improvements cannot affect the right of the original inventor.¹

It follows that the question of infringement in such cases does not necessarily depend upon the consideration whether the mechanical structure of the machines is alike. Whatever be the mechanical structure, the question is, whether the later machine contains the means or combination found in the previous one; — in a word, whether the new idea is embodied in the machine complained of. If the plaintiff's combination be found substantially incorporated into the defendant's machine, then the latter's mechanical construction, whatever it may be, is in law but an equivalent for the mechanical construction of the plaintiff's machine. No man is allowed to appropriate the benefit of the new ideas which another has originated and put to use, because he may have been enabled, by superior mechanical skill, to embody them in a different form. In appropriating the idea, he may have appropriated all that is valuable in the new machine.²

The mere fact that the machine alleged to be an infringement does its work better, or turns out more work in the same time, than the patented article, does not show that there is no infringement. This superiority might be due merely to superior construction upon the same principle

¹ *Odiorne v. Winkley*, 2 Gal. 51; *McCormick v. Seymour*, 2 Blatchf. 240; *Blanchard v. Beers*, *Ib.* 418.

² *Blanchard v. Beers*, *supra*.

with that of the patented machine. Such a result is only to be considered in its bearing upon the question whether the principle of the machine complained of is actually and substantially different from that of the plaintiff.¹ Of course, if the greater or superior efficiency be produced by reason of the use of means which are different in substance from those employed in the patented machine, and are not their mechanical equivalent, there is no infringement.²

An infringement is also committed, though, besides being equivalent to the thing patented, the later machine accomplishes some other advantage beyond that effected by the patent machine. The new machine is still an infringement, so far as it covers the object of the patent. For example: The defendant, for the purpose of giving signals by telegraph, uses the earth for effecting a return circuit; the plaintiffs having a patent for giving signals by means of electric currents transmitted through *metallic currents*. The machinery, aside from the return circuit, used by the defendant is the same as that covered by the plaintiff's patent, and is used without license. The defendant is liable, though the use of the earth for effecting a return circuit is an improvement in the art of telegraphing.³

Where, however, the means employed in the later machine are different, not merely in form, but in substance, and consist in combinations differing in substance, there is no infringement, though the object be to produce the same result. For example: The defendant constructs a machine for obtaining a current of air between the grinding surfaces of mill-stones, by means of a rotating vane, for effecting which the plaintiff also has a machine, protected by patent. The plan of the defendant is to remove from the centre of both stones a large circular portion, and in this space, op-

¹ *Ib.*; *Gray v. James*, Peters, C. C. 394.

² *Curtis*, Patents, § 330.

³ *Electric Tel. Co. v. Brett*, 10 Com. B. 838.

posite the opening between the two stones, to place a fan, by the rapid rotation of which a centrifugal motion is given to the air, driving it between the stones. The plan of the plaintiff consists of a portable ventilating machine, blowing by a screw vane, which causes a current of air parallel to the axis of the vane, being attached externally to the eye of the upper mill-stone; and the screw vane being thus set in rapid motion, the air is forced through the eye into the centre of the stones, and so finds its way out again. The defendant's machine is not an infringement upon the plaintiff's.¹

To substitute in place of some one element in a composition of patented matter a mere known equivalent is an infringement, because, though the patentee may not have expressly mentioned such equivalent in his claim, he is understood to have included it, and in contemplation of law he has included it. However, if he should confine himself to the specific equivalents mentioned in his claim for the patent, by excluding all others, the case will be different, and there will be no infringement in the use of any of such other equivalents.²

With regard to patents for designs, the patent acts are intended to give encouragement to the decorative arts. They contemplate not so much practical utility as appearance. It is the appearance itself which makes the article salable, and the mode in which these appearances are produced has little, if any thing, to do with giving increased salableness to the article. The appearance, then, furnishes the test of identity of design. Mere difference of lines in the drawing or sketch, a greater or less number of lines, or slight variances in configuration, if insufficient to change the effect upon the eye of the ordinary observer, will not destroy the substantial identity. An engraving

¹ *Bovill v. Pimm*, 11 Ex. 718.

² *Byam v. Farr*, 1 Curtis, C. C. 260.

which has many lines may present to the ordinary eye the same picture, and to the mind the same idea, as another with fewer lines. If, then, there be identity of design (not to an expert, but) to the ordinary observer, there is an infringement upon the patented design. For example: The defendant vends a carpet containing figures of flowers arranged in wreaths different in fact, upon close observation, from the plaintiff's patented design for wreaths of flowers upon carpets; the flowers on the defendant's carpet being fewer in number than those on the plaintiff's, and the wreaths being placed at somewhat wider distances. But this difference would not be detected except upon a close comparison. The defendant is liable to the plaintiff in damages.¹

The test in most, if not in all, cases appears to be whether the supposed difference of construction or design would be sufficient to warrant a new patent for the product, in the presence of the patent already in existence.

Under the statute, the mere making, without the sale or use of the articles or object patented, is an infringement of the rights of the patentee; and it follows that such an act may be treated as a ground of liability, though no damage be sustained by the patentee. He will be entitled to recover nominal damages at least;² and perhaps substantial damages should the act be repeated.³ It is equally a ground of liability to use an article which is an infringement of a patent, though the party using it did not make it; and the same is true of the sale of such an article. Each of these acts is an invasion of the patentee's right: it is a breach of duty to him; and the party doing the act is liable, however innocent of any intention to injure the true patentee.

¹ Gorham Co. v. White, 14 Wall. 511.

² Whittemore v. Cutter, 1 Gal. 429.

³ Compare the rule in trespass to land, *ante*, p. 174.

There is some question, however, of the liability of a party who, without license, makes a patented article for mere philosophical experiments (when the article itself was not intended for such purposes), or for the purpose of ascertaining the sufficiency of the thing to produce the effects claimed for it, or when it is made for mere amusement, or as a model.¹ But the better opinion seems to be that the language of the statutory prohibition covers such cases.²

The unauthorized sale of a patented machine, to constitute an infringement, must be a sale, not of the materials of a machine, either separate or combined, but of a complete machine, with the right, expressed or implied, of using the same in the manner secured by the patent. It must be a tortious sale, it has been said, not for the purpose merely of depriving the owner of the materials, but of the use and benefit of his patent, — a point, however, of some doubt, as has already been observed. The sale of the materials merely, cannot, it is clear, amount to an infringement. For example: The defendant, a deputy sheriff, having an execution against the plaintiffs, levies upon and sells the materials of three patented machines, of which the plaintiffs are owners, the materials being at the time complete and fit for operation as machines. The purchaser has not put any of the machines into operation; nor is the sale made with intent that he should do so. This is not a breach of duty to the plaintiffs.³

The sale or use of the product of a patented machine is no violation of the exclusive right to use, construct, or sell the machine itself; and the patent for a discovery of a new and improved process, by which any product or man-

¹ See *Whittemore v. Cutter*, *supra*; *Sawin v. Guild*, 1 Gal. 485; *Jones v. Pearce*, Webs. Pat. Cas. 125.

² *Watson v. Bladen*, 4 Wash. 583; *Curtis, Patents*, § 291.

³ *Sawin v. Guild*, 1 Gal. 485.

ufacture before known in commerce may be made in a better and cheaper manner, grants nothing but the exclusive right to use the process. Where a known manufacture or product is in the market, purchasers are not bound to inquire whether it was made on a patented machine or by a patented process. But, if the patentee be the inventor or discoverer of a new manufacture or composition of matter not known or used by others before his discovery or invention, his franchise or right to use and vend to others to be used is the new composition or substance itself. The product and the process, in such a case, constitute one discovery, the exclusive right to make, use, or vend which is secured to the patentee. For example: The defendants, a railroad company, use, without license of the plaintiff, a certain article called vulcanized India-rubber in their car-springs, for the manufacture of which substance the plaintiff has a valid patent; his specification, though describing primarily a process, still showing that the purpose and merit of the process was the production of a valuable fabric. The plaintiff has a patent in the article itself, and the act of the defendants is a breach of duty to him.¹

Finally, the Revised Statutes of the United States provide that every person who, in any manner, marks upon any thing made, used, or sold by him for which he has not obtained a patent, the name or any imitation of the name of any person who has obtained a patent therefor, without the consent of such patentee, or his assigns or legal representatives; or who, in any manner, marks upon or affixes to any such patented article the word "patent" or "patentee," or the words "letters-patent," or any word of like import, with intent to imitate or counterfeit the mark or device of the patentee, without having the license or consent of such patentee or his assigns or legal representatives; or who, in any manner, marks upon or affixes to

¹ *Goodyear v. Railroad*, 2 Wall. C. C. 356.

any unpatented article the word "patent," or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable for every such offence, to a penalty of not less than one hundred dollars, with costs; one-half of said penalty to the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offence may have been committed.¹

§ 3. OF WHAT CONSTITUTES INFRINGEMENT OF COPYRIGHT.

The Revised Statutes of the United States grant to any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person, who complies with certain preliminary requirements, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others; and to authors the privilege of reserving the right to dramatize or to translate their own works.² The copyright is to be good for twenty-eight years, with the right of renewal for fourteen years more.³ And any person who, without consent of the owner of the copyright, obtained in writing signed by two or more witnesses, shall print, publish, or import, any book, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any

¹ Rev. Sta. § 4901.

² Rev. Sta. § 4952.

³ Ib. §§ 4953, 4954.

copy of such book, shall forfeit every copy thereof, and be liable in damages for the act.¹

To the author of copyrighted matter thus belongs the exclusive right to take all the profits of publication which the sale of the copyrighted matter may produce. And the author's exclusive right extends to the whole copy, and, in a sense, to every part of it. It follows that an infringement of a man's copyright may be committed (1) by reprinting the whole copy, *verbatim*; (2) by reprinting, *verbatim*, a part of it; (3) by imitating the whole or a part, or by reproducing the whole or a part with colorable alterations or disguises, intended to give it the character of a new work; (4) by reproducing the whole or a part under an abridged form.²

With regard to each of these forms of infringement, it is to be observed that the question of intention does not directly enter into the determination of the question of piracy. The exclusive privilege which the law secures to authors may be equally violated whether the work complained of has been published with or without the *animus furandi*. The fact that a party has honestly mistaken the extent of his right to avail himself of the works of others will not excuse him from liability.³

Piracies of the nature of those mentioned under the first head are seldom committed, and they may be dismissed with the observation that it matters not how much other matter, or how valuable the same, may be incorporated with the reprint of the copyrighted matter. The act is an infringement, though the public might derive great benefit from the superior value of the work.

Piracies of the second class are more difficult to deal with. The quantity of matter cannot be a true criterion of the commission of an infringement, since only a small

¹ Rev. Sts. § 4964.

² Curtis, Copyrights, 238.

³ *Ib.*; *Emerson v. Davies*, 3 Story, 768.

portion of a work may be pirated, and this the most important part of the work, or a very important part of it. For example : The defendant makes use, in a published volume, of judicial decisions, of the head-notes, or marginal notes, of the plaintiff in a series of volumes of reports, of which the plaintiff owns the copyright. This is an infringement of the plaintiff's rights, for which the defendant is liable ; though such notes constitute but a small part of the plaintiff's work.¹

It may be doubtful if any part of the work of another may be taken *animo furandi*.² How much may be honestly taken, that is, taken without any purpose of supplanting the copyright work, is the difficult question. It is clear that, if so much be taken as to sensibly diminish the value of the original, an infringement has been committed.³ It is not only quantity, but value also, that must be taken into the consideration.⁴

In deciding questions of this sort, it has been observed that the nature and objects of the selections made must be taken into account, the quantity and value of the materials used, and the extent to which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work.⁵ Many mixed ingredients enter into the discussion of such questions. In some cases, a considerable portion of the materials of the original work may be fused into another work, so as to be distinguishable in the mass of the latter ; but yet the latter, having a distinct purpose from the copyrighted book, may not be an in-

¹ See *Wheaton v. Peters*, 8 Peters, 591. Also *Saunders v. Smith*, 3 Mylne & C. 711; *Sweet v. Sweet*, 1 Jur. 212; *Sweet v. Benning*, 16 Com. B. 459.

² Mr. Godson thinks it cannot. *Patents and Copyrights*, 216. Mr. Curtis, *contra*. *Copyrights*, 251, note.

³ *Bramwell v. Halcomb*, 3 Mylne & C. 737; *Saunders v. Smith*, Ib. 711.

⁴ Ib.

⁵ *Folsom v. Marsh*, 2 Story, 100.

fringement. In other cases the same materials may be used as a distinct feature of excellence, and constitute the chief value of the new work, and then the latter will be an infringement.¹ Be the quantity, then, large or small, if the part extracted furnish a substitute for the work from which it is taken, so as to work an appreciable injury, there is an actionable violation of copyright.²

A person is entitled to make a reasonable amount of quotation from a copyrighted production by way of review or criticism; but, under the pretence of review, no one has the right to publish a material part of the author's work;³ that is, such a part as might have a sensible effect in superseding the original,⁴—not perhaps as a whole, but *quoad hoc*.⁵

As to imitations of the whole or part of a copyrighted work, the difficulty of determining the question of piracy is scarcely less. There may be likeness without copying; and, though the copyrighted work may have suggested the new one, the imitation may not be close enough to amount to infringement. The question, however, is, whether the variation be substantial or merely colorable.⁶ For example: The defendant is alleged to have infringed the plaintiff's copyright in an Arithmetic by imitating its plan and contents. The test of the defendant's liability is whether he has in fact used the plan, arrangements, and illustrations of the plaintiff as the model of his own work, with colorable alterations and variations, only to disguise the use thereof, or whether the defendant's work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, the resem-

¹ *Folsom v. Marsh*, 2 Story, 100.

² *Curtis*, Copyright, 245; *Folsom v. Marsh*, 2 Story, 100.

³ See *Wilkins v. Aiken*, 17 Ves. 422, 424.

⁴ *Roworth v. Wilkes*, 1 Campb. 94.

⁵ *Curtis*, 246, note.

⁶ *Trusler v. Murray*, 1 East, 363, note; *Emerson v. Davies*, 8 Story, 768, 793.

blances being accidental, or arising from the nature of the work ; — whether, in short, the defendant's work be *quoad hoc* a servile or evasive imitation of the plaintiff's work, or a *bona fide* original composition from other common or original sources.¹

In cases of this kind, it is not enough to establish a violation of duty that some parts or pages of the later work bear resemblances in methods, details, and illustrations to the copyrighted work. It must further appear that the resemblances in those parts or pages are so close, so full, so uniform, and so striking, as fairly to lead to the conclusion that the one is a substantial copy of the other, or is mainly borrowed from it.²

It is to be observed, therefore, that it does not follow that because the same sources of information are open to all persons, and by the exercise of their own skill, talent, or industry they could, from all of these sources, have produced a similar work, one party may, at second hand, without any exercise of skill, talent, or industry, borrow from another all the materials which have been accumulated and combined by him. For example: The defendant copies a map of a town from the plaintiff's copyrighted map, the latter being made by actual surveys of the region. This is an infringement of the plaintiff's copyright, though the means used by the plaintiff for making his map were open to all persons alike.³

The next case is that of abridgments ; the rule of law in England as to which is said to be, that a fair abridgment, when the understanding is employed in retrenching unnecessary circumstances, is not a piracy of the original work. Such an abridgment is allowable as constituting a new work.⁴

¹ *Emerson v. Davies*, *supra*.

² *Ib.*

³ See *Gray v. Russell*, 1 Story, 11, 18.

⁴ *Copinger, Copyrights*, 101.

It is not clear what the American law upon this point is. It is certain, however, that to justify an abridgment of a copyrighted work, the case must be one of a *bona fide* character, and not a mere evasive reproduction of the original, by the omission of some unimportant parts. It is also a matter for consideration whether the new work will prejudice or supersede the old, whether it will be adapted to the same class of readers, and often other things of the same sort must be weighed. In many cases, the question may turn upon a consideration not so much of the quantity used as of the value of the selected materials,¹ as has been observed in another connection.

The true question in cases of this kind, indeed, appears to be whether there has been a legitimate use of the copyright publication, in the fair exercise of a mental operation, deserving the character of a new work. If there has been, though it may be prejudicial to the original author, it is not deemed to be an invasion of his rights. If there has not been, then it is treated as a mere colorable curtailment of the original work, and an evasion of the copyright.² It cannot be affirmed, however, that there is any certain and well-defined rule of law in the United States upon this subject.

Digests of larger works fall under the head of abridgments. Such publications are in their nature original. The compiler intends to make a new use of them not intended by the original author. But such works must be real digests, and not mere colorable reproductions of the original, in whole or in an essential part. The work bestowed upon a digest must be something more than the labor of the pen and the arrangement of extracts: it must be mental labor, designed to produce a new work, the

¹ Gray v. Russell, 1 Story, 19.

² 2 Story, Equity, § 939. See, also, Story v. Holcombe, 4 McLean, 306.

object of which must clearly appear to be consistent with the rights of the author of the original work.¹

It is not an infringement of a copyright, by the American law, to translate, without license of the author, a copyrighted work into a foreign language;² unless the author has reserved the right of translation. And this is true in America, though the author has himself procured and copyrighted a translation of his work into the same language with the translation complained of. For example: The defendant translates into German a book entitled "Uncle Tom's Cabin," and publishes his translation here; the plaintiff, the author, having previously procured her work to be translated into that language, and having procured a copyright upon her translation. The defendant has violated no duty to the plaintiff.³

Finally, the Revised Statutes of the United States provide that every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury.⁴

¹ See the remarks of Lord Lyndhurst in *D'Almaine v. Boosey*, 1 Younge & C. 288, a case of infringement of a copyrighted musical composition.

² *Stowe v. Thomas*, 2 Wall. C. C. 547.

³ *Stowe v. Thomas*, *supra*. See *Shook v. Rankin*, 6 Biss. 477.

⁴ Rev. Sts. § 4967.

CHAPTER XI.

VIOLATION OF RIGHTS OF SUPPORT.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty (1) to forbear to remove, to B's detriment, the lateral support of B's land, so long as it lies in its natural condition; (2) to forbear to remove negligently, to B's detriment, the lateral support of B's land with the superincumbent weight of buildings or materials thereon, adjacent to the boundary; (3) to forbear to withdraw, to B's detriment, the subjacent support of his premises.

§ 2. OF LATERAL SUPPORT.

The owner of land has a right, as against his neighbor, to what is termed the lateral support of his ground. This right of lateral support is a right of support of the land in its natural condition, or, in case of grant or prescription, in an artificial condition; and this right of support of land in its natural condition is, *prima facie*, a right analogous to the right to make use of a running stream or of the air. It is not in the nature of an easement, and does not depend upon prescription or grant.¹ But of course a right to remove the support may be acquired by grant;² though not by custom or prescription, because prescription in such a case, it is said, would be oppressive and unreasonable.³

¹ *Bonomi v. Backhouse*, El., B. & E. 646; s. c. 9 H. L. Cas. 503.

² *Rowbotham v. Wilson*, 8 H. L. Cas. 348.

³ *Hilton v. Granville*, 5 Q. B. 701; *Wakefield v. Buccleugh*, Law R. 4 Eq. 613.

The right of support of the land surrounding a man's premises being then a right of property, it follows that it cannot, in the absence of permission, grant, or prescription, be withdrawn by the adjoining occupant without an actionable breach of duty. For example: The defendant, owner of premises adjoining the premises of the plaintiff, which are located upon the side of a declivity, excavates the earth of his land so closely to the boundary between his own and the plaintiff's property as to cause the soil of the plaintiff's premises, of its own natural weight, to slide away into the pit. This is a breach of duty to the plaintiff, for which the defendant is liable in damages.¹

Some doubt has, indeed, been cast upon the soundness of this proposition as a general doctrine of law. It has been observed that, if it were carried out to its legitimate consequences, it would often deprive men of the whole beneficial use of their property. An unincumbered lot in a city, it is said, would be worth little or nothing to the owner unless he were allowed to dig in it for the purpose of building.² But the answer to this would appear to be, that it would impose no hardship upon the person desiring to excavate to shore up the soil of the adjoining premises so as to prevent it from sinking into his pit. And the authorities are very generally in accord with the rule which governed the above-mentioned example.³

The doctrine, however, goes no further than to sustain a right of action for the sinking of land in its natural condition. The action cannot be maintained if the sinking be

¹ *Thurston v. Hancock*, 12 Mass. 220; s. c. *Bigelow's L. C. Torts*, 527.

² *Radcliff v. Brooklyn*, 4 Comst. 195. This was a *dictum*, and has been denied in 2 Wash. Real Prop. 331 (3d ed.), and in *Farrand v. Marshall*, 21 Barb. 409, 414; *McGuire v. Grant*, 1 Dutch. 356, 367. See *Foley v. Wyeth*, 2 Allen, 131.

³ See *Washburn, Easements*, 542-544 (3d ed.); *Gale, Easements*, 336 (4th ed.).

due to a superincumbent weight placed upon the plaintiff's premises, unless a right was acquired as against the adjoining occupant by grant or prescription. For example: The defendant digs a gravel pit in his premises close to the line between his own and the plaintiff's land. Within two feet of the line, on the plaintiff's land, stands a brick house, erected ten years before, and occupied by the plaintiff. By reason of the defendant's excavation, the premises being located on the side of a hill, it becomes necessary for the plaintiff to vacate his house, and to take it down, to prevent it from sliding into the defendant's pit. The defendant is not liable, since it was the plaintiff's own folly to build so near the line.¹

The right to the lateral support of buildings is therefore in the nature of a right of easement, which can be acquired only by grant or by prescription which supposes a grant. But even though a building may have stood upon the plaintiff's premises for the period of prescription, if its walls were improperly constructed, so as for this cause to give way, and not by reason of the excavation alone, the plaintiff cannot recover.² And the same would be true, if, within the period of prescription, a new story were added to the house, whereby the pressure was so increased as to cause the sinking.³

On the other hand, it is to be observed that the mere fact that there were buildings, recently erected, standing upon the border of the plaintiff's land when it sank, will not prevent a recovery of damages. If the soil sank, not on account of the additional weight, but on account of the operations in the adjoining close (though they were carefully conducted), and would have sunk had there been no

¹ *Thurston v. Hancock*, *supra*; *Panton v. Holland*, 19 Johns. 92; *Lasala v. Holbrook*, 4 Paige, 169.

² *Richart v. Scott*, 7 Watts, 460; *Dodd v. Holme*, 1 Ad. & E. 493.

³ See *Murchie v. Black*, 34 Law J. C. P. 337.

buildings upon it, the person sustaining the damage is entitled to redress to the extent of his loss.¹ So, also, if the operation in the adjoining land were conducted with a negligent disregard to the rights of the plaintiff, and the effect of such negligence were the fall of the plaintiff's building, the adjoining occupant is liable.² But in the absence of negligence in the defendant, if the damage to the plaintiff's premises would have been slight and inappreciable had there been no superincumbent weight thereon, he will not be entitled to recover.³

The result therefore is, (1) that the defendant is liable for the damages suffered by his neighbor from the withdrawal of the lateral support when that act, of itself, and without the fault of the neighbor, was the cause of the damage, including in the damage the injury done to soundly built buildings; and this, too, though the party making the excavation was not guilty of negligence in the work. (2) He is liable for all the damage suffered by withdrawing the support when he was guilty of negligence, including in the damages injuries to soundly built buildings. (3) He is not liable if the subsidence was caused by the weight of buildings, or by the defective condition of the same.

The right of lateral support to contiguous buildings is somewhat different, and depends upon grant, reservation, or prescription. Where buildings have been erected in contiguity by the same owner, and therefore require mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support in favor of the original owner on a sale by him of any of the buildings. As against himself, on the other hand, there is a

¹ *Strayan v. Knowles*, 6 Hurl. & N. 454.

² See *Charless v. Rankin*, 22 Mo. 566, 574; *Schriever v. Stokes*, 8 B. Mon. 453, 459; *Dodd v. Holme*, 1 Ad. & E. 493.

³ *Smith v. Thackerah*, Law R. 1 C. P. 564.

presumed grant of the right of support in favor of the purchaser, which right takes effect at once. And the reservation in the original owner, after one sale, of the right of support for the adjoining building, will enable a second purchaser, on buying this adjoining house, to claim against his neighbor the same right of support; since by the purchase he acquires all of his vendor's rights. It follows also that the same mutual dependency continues after subsequent alienations by the purchasers from the original owner, and this regardless of the question of time. For example: The defendant constructs a drain under his house to connect with a public sewer, and thereby weakens the support of the wall separating the defendant's house from the plaintiff's, to the injury of the latter's house. The two houses originally belonged to the same person, who had demised them both for ninety-nine years to W. The latter mortgages both to B., who assigns the mortgage to H., and H. conveys (under a power) one of the houses to the plaintiff in the month of July, and the other to the defendant in September following. The defendant's act in weakening the support of the plaintiff's house is a breach of legal duty, and the defendant is liable in damages.¹

But the right to such support of buildings is not a natural right; and where the adjoining buildings were erected by different owners the right of support can be acquired in favor of either of the original owners (and their successors in estate) only by grant of the other or by prescription. For example: The defendants pull down a house adjoining the plaintiff's, without shoring up the latter, and thereby cause damage to the plaintiff's property. The houses were built about the same time, but by different owners of the soil; and there is no title to support either by grant or by prescription, nor has the

¹ Richards v. Rose, 9 Ex. 218.

pulling down been negligently done. The defendants are not liable; at least if the plaintiff has sufficient notice of the purpose of the defendants to enable him to take the proper precautions against the damage.¹

If there be an intervening house or store in the block, between the premises of the plaintiff and those of the defendant, the pulling down of the latter's building cannot be a breach of duty to the former in the absence of some special engagement between the parties, especially if the plaintiff's building was already in an unsafe condition.²

There is said to be no obligation by the English law resting upon the owner of a house towards his neighbor in the adjoining tenement to keep his house in repair (further than to prevent the same from becoming a nuisance) in a lasting and substantial manner. The only duty is deemed to be to keep it in such a state that his neighbor may not be injured by its fall. The house may, therefore, be in a ruinous condition, provided it be shored sufficiently, or the house may be demolished altogether, if this can be done without injury to the adjoining house.³

If either of the co-owners of a party-wall should wish to improve his premises before the wall has become ruinous, or incapable of further answering the purposes for which it was built, he may underpin the foundation, sink it deeper, and increase, within the limits of his own land, the thickness, length, or height of the wall, if he can do so without injury to the building upon the adjoining close. And to avoid such injury, he may (and perhaps he should) shore up and support the original wall for a reasonable time, in order to excavate and place a new underpinning beneath it. But he cannot without consent interfere with it in any manner unless he can do so without injury to the

¹ *Peyton v. London*, 9 Barn. & C. 725.

² *Solomon v. Vintners' Co.*, 4 Hurl. & N. 585.

³ *Chauntler v. Robinson*, 4 Ex. 163, 170.

adjoining building. No degree of care or diligence in the performance of the work will relieve him from liability, if injury be done to the adjoining building by making the improvements. For example: The defendant, co-owner with the plaintiff of a party-wall between their premises, digs down his cellar about eighteen inches, underpinning the party-wall, and lowers the floor of his first story the same distance. In consequence of these operations, the division wall settles several inches, carrying down the plaintiff's floors, and cracking the front and rear walls of his (the plaintiff's) building. The defendant is liable to the plaintiff for the damage thus caused, though the said operation were carried on prudently and carefully.¹

It follows that, if a party-wall rest upon an arch, the legs of which stand within the land of the respective owners, neither can remove one of the legs to the detriment of his neighbor, without his consent.² On the other hand, either may run up the wall to any height, provided no damage be thereby done to the other.³

The existence of a right to fix a beam or timber into the wall of a neighbor's house depends upon the situation of the wall. If it stand wholly upon the land of the owner, it is clear that no such right can exist except by grant or prescription. Any attempt by the adjoining owner to fix a timber in the wall, without consent given, would be a trespass, for which an action would lie; or (probably) it could be treated as a nuisance and abated accordingly. And a wall thus situated (the adjoining owner having acquired no right to the enjoyment of it) may be altered or removed at pleasure, provided no damage be thereby done to the adjoining premises.

¹ *Eno v. Del Vecchio*, 6 Duer, 17; s. c. 4 Duer, 58.

² *Partridge v. Gilbert*, 15 N. Y. 601; *Dowling v. Hemmings*, 20 Md. 179.

³ *Matts v. Hawkins*, 5 Taunt. 20; *Brooks v. Curtis*, 50 N. Y. 639, 644

If, however, the wall be a party-wall, owned in severalty to the centre thereof, or in common, by the adjoining owners, the case will of course be different; and each will be entitled to fix timbers into it, in a prudent manner, doing no damage to the wall or prejudice to the other owner.¹

Where the wall is owned in severalty to the centre, it would seem that neither owner could extend his timbers beyond the centre of the wall. To pass the line of division without permission would be, apparently, as much a trespass as to make an entry upon the soil without permission.

On the other hand, the case would probably be different if the wall were owned in common by the adjoining proprietors, since, as has elsewhere been observed,² tenants in common are each seized of the whole common property. And it follows that such a wall may also be taken down by either owner, for the purpose of rebuilding, if necessary.³

§ 3. OF SUBJACENT SUPPORT.

While ordinarily a man's title to land includes the underlying soil to an indefinite extent towards the centre of the earth, it is settled law that there may be two freeholds in the same body of earth measured superficially and perpendicularly down towards the earth's centre; to wit, a freehold in the surface soil and enough lying beneath it to support it, and a freehold in underlying strata, with a right of access to the same, to work therein and remove the contents.⁴

This right to the subjacent strata, however, as is above intimated, is not unqualified; on the contrary, it must be exercised in such a way as not to impair the support of the

¹ See Bigelow's L. C. Torts, 555.

² *Ante*, p. 169.

³ *Stedman v. Smith*, 8 El. & B. 1.

⁴ Washburn, Easements, 588 (3d ed.); *Humphries v. Brogden*, 12 Q. B. 739; s. c. Bigelow's L. C. Torts, 536; *Wilkinson v. Proud*, 11 Mees. & W. 33.

surface freehold. And if that freehold, in its natural condition, be deprived of its necessary support by underground excavation, the party committing the act is liable, however carefully he may have conducted the work in his own freehold. For example: The defendants, a coal mining company, lessees of a third person of coal mines underlying the plaintiff's close, upon which there are no buildings, in the careful and usual manner of working the mine so weaken the subjacent support to the plaintiff's close, without his consent, as to cause the same to sink and suffer injury. The defendants are liable for the damage sustained.¹

It is also laid down that there is a difference between rights of support against a subjacent owner of land and an adjacent owner; that is, between underlying and lateral support, in respect of erections upon the dominant tenement. The right to the support of buildings, as has been observed, depends, generally, in the absence of grant and reservation, upon the question whether they are ancient or not, that is, whether a prescriptive right has been acquired to the lateral support. But, as against an underlying freehold, the owner of the surface freehold is entitled to the support of all buildings which were erected, however recently, before the title of the lower owner began and possession was taken. For example: The defendants are lessees and workers of a mine under the plaintiff's freehold. The plaintiff, at various times before the defendants began their works, and within twenty years thereof, erects buildings above the mines on ground honeycombed by the workings of another company some years before. The workings by the defendants increase the defective nature of the ground, and a subsidence of the surface follows; and from this cause and the fact that the plaintiff's buildings were not constructed with sufficient solidity, consider-

¹ *Humphries v. Brogden, supra.*

ing the state of the ground, damage ensues to the plaintiff's buildings. The defendants have violated their duty to the plaintiff by not shoring up and supporting the overlying tenement.¹

The support required, in the absence of grant or prescription, appears, however, to be merely a reasonable support; and this has been suggested to mean a support sufficient for all the ordinary and useful purposes of life, among them to houses for providing dwellings. Whether, in the absence of consent, the owner of the upper tenement could require the owner or occupant of the lower to support structures of extraordinary weight, such as a cathedral, is doubtful. The true view seems to be that when the owner of the whole property severs it by a conveyance either of the surface, reserving the mines, or of the mines, reserving the surface, he intends, unless the contrary be made to appear by express words, that the land shall be supported, not merely in its original condition, but in a condition suitable to any of the ordinary uses necessary or incidental to its reasonable enjoyment.²

The right of support of upper tenements of houses owned by different persons is analogous. This subject, however, does not appear to have engaged the attention of the courts. It seems but reasonable that the occupant of the lower tenement should be required to abstain from all acts which would impair the support of his neighbor above him, without properly guarding against a subsidence of the upper tenement.

¹ *Richards v. Jenkins*, 18 Law T. n. s. 437. Of course, if the building would have fallen without the act of the defendants, they would not be liable for the damage to them.

² *Richards v. Jenkins*, *supra*. In this case, however, Mr. Baron Channel inclined to think that, if the buildings were erected *after* the defendants took possession, the period of prescription should elapse before a right to their support could be acquired.

CHAPTER XII.

VIOLATION OF WATER RIGHTS.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty (1) to forbear to obstruct or divert the flow of waters running in known, defined channels by any unusual or unreasonable use or works, to the detriment of B; (2) to forbear to pollute the waters of a stream running in a known, defined channel, to the detriment of B, without legislative authority; and (3), having legislative authority in the last case, to forbear to be guilty of an abuse thereof.

§ 2. OF USUFRUCT AND REASONABLE USE OF STREAMS.

In regard to surface water, running in defined channels, the rule of law is that riparian proprietors have no absolute right to the water of the streams flowing by them, but merely the usufruct thereof. They are entitled to make a proper use of the water; and in no case, by the weight of authority, is a party liable to a lower land-owner for abstracting water, if actual damage has not been done to him.¹ For example: The defendants, a railroad company, pursuant to a warranty deed from C., a riparian owner above the plaintiff, erect a dam across a brook running through the plaintiff's land, and construct a reservoir upon

¹ Elliot v. Fitchburg R. Co., 10 Cush. 191; s. c. Bigelow's L. C. Torts, 509; Seeley v. Brush, 35 Conn. 419; Chatfield v. Wilson, 31 Vt. 358; Gerrish v. New Market Manuf. Co., 30 N. H. 478, 483; Dilling v. Murray, 6 Ind. 324; Wood v. Wand, 3 Ex. 748, 781; Embrey v. Owen, 6 Ex. 353.

the stream, and insert a lead pipe therein, by means of which they have used and constantly taken water from the reservoir to their depot at S., and used the same for supplying their locomotive steam-engines with water, and for similar purposes. The place of the water thus abstracted is made good by other water let into the brook by the defendant's grantor; and the plaintiff is unable to prove any damage by reason of the diversion of water to the defendants' depot. The defendants have violated no duty to the plaintiff.¹

There have, however, been expressions by the courts, and one or two decisions, to the effect that the right to the use of a running stream is something more than a right of usufruct, and is in fact absolute, like the right to the enjoyment of land; so that any diminution of the water by an upper proprietor is deemed actionable if he have not a right by grant of the lower proprietor, or by prescription, just as an entry upon land without license is actionable.²

The true principle, however, is that the lower riparian owner has, as against the upper proprietor, merely a usufruct, and not an absolute right to the water, however long he may have been in the enjoyment; and, this being so, there can be no infraction of the right by any abstraction of water which does not sensibly and injuriously affect its volume. Without such an act, the usufruct is not interfered with, and the right of the lower proprietor has not been encroached upon.

In the language of judicial authority, the right to the water of streams is a right incident to property in the land; it is a right *publici juris*, of such character that while it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the gifts of

¹ Elliot v. Fitchburg R. Co., 10 Cush. 191.

² Wheatley v. Chrisman, 24 Penn. St. 298; Crooker v. Bragg, 10 Wend. 260.

Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful to a proprietor lower down.¹

What amounts to such a just and reasonable use may often be a difficult question. To take a quantity of water from a large stream for agriculture or manufacturing purposes would cause no sensible diminution of the benefit, to the prejudice of a lower proprietor; while taking the same quantity from a small brook passing through many farms would be of great and manifest injury to those below who need it for domestic or other use. This would be an unreasonable use of the water, and an action would lie therefor.²

And this leads to the remark that the criterion of liability for abstracting water from running streams, used for milling purposes, is whether, considering all the circumstances, the size of the stream and that of the mill-works, there has been a greater use of the stream, in abstracting or detaining the water, than is reasonably necessary and usual in similar establishments for carrying on the mill. A mill-owner is not liable for obstructing and using the water for his mill, if it appear that his dam is of such magnitude only as is adapted to the size and capacity of the stream, and to the quantity of water usually flowing therein, and that his mode of using the water is not unusual or unreasonable, according to the general custom of the country in cases of dams upon similar streams; and this, whatever may be the effect upon the owners of land below.³

¹ Elliot v. Fitchburg R. Co., *supra*.

² *Ib.*

³ Springfield v. Harris, 4 Allen, 494; s. c. Bigelow's L. C. Torts, 506. See Davis v. Getchell, 50 Maine, 602; Merrifield v. Worcester, 110 Mass. 216; Hayes v. Waldron, 44 N. H. 580; Pool v. Lewis, 41 Ga. 162; Timm v. Bear, 29 Wis. 254; Clinton v. Myers, 46 N. Y. 511.

For example : The defendant is the owner and occupant of a mill standing on his land, above the land of the plaintiffs, riparian owners on the same stream, and has, in operating his mill and the works contained in it, used the water of the stream by means of a dam erected across it. The dam is of a magnitude adapted to the size of the stream, and the mode of using it is usual and reasonable, according to the custom of the country in like cases. The defendant is not liable to the plaintiffs, though the result is to prevent the plaintiffs from deriving any benefit, such as they would otherwise enjoy, from the existence of the stream.¹

It is not clear whether mill cases stand upon any favored footing, apart from statute. If they do not, it follows that the question of damage to the lower proprietor is in no case the criterion for determining whether there has been a violation of duty ; the true test being that of reasonable use.

In the Pacific States, the rights of riparian occupants are different. The person who there first appropriates, for mining or other purposes, the waters of a stream running in the public lands, is entitled to the same, to the exclusion of all subsequent appropriations by other persons for the same or for other purposes.² But, if the first occupant appropriate only part of the water, another may appropriate the rest ; or if he take all only on certain days of the week, another may take all upon other days.³ The appropriation must, however, be for some "useful purpose," present or in contemplation, and is not permitted for speculation,⁴ or even for drainage merely.⁵

The water of a stream running wholly within a man's land may be diverted, if it be returned to its natural

¹ *Springfield v. Harris*, *supra*.

² *Smith v. O'Hara*, 43 Cal. 371.

³ *Ib.*

⁴ *Weaver v. Eureka Lake Co.*, 15 Cal. 271.

⁵ *McKinney v. Smith*, 21 Cal. 374.

channel before reaching the lower proprietor;¹ and this could perhaps be done where the water runs between the lands of riparian occupants, so far as the rights of parties lower down are concerned. The only person entitled to complain of such an act would be the opposite proprietor.

It is to be observed, however, that the foregoing supposes that there exists no right by prescription or grant to the use of the stream by either the upper or lower proprietor. The rights and burdens of the parties may be greatly varied by grant or by prescription.

With regard to surface water running in no defined channel, the rule of law is that every occupant of land has the right to appropriate such water, though the result is to prevent the flow of the same into a neighboring stream, or upon the land of an adjoining occupant.² For example: The defendant, for agricultural and other useful purposes, digs a drain in his land, the effect of which is to prevent the ordinary rainfall, and the waters of a spring arising upon his land, and flowing in no defined channel, from reaching a brook, upon which the plaintiff has for fifty years had a mill. The defendant is not liable for the diversion, however serious the inconvenience to the plaintiff.³

§ 3. OF SUB-SURFACE WATER.

Thus far of rights to appropriate the water of natural streams running in defined channels above ground. As to underground water, percolating through the soil, and not running in defined currents, no rights can arise by grant or prescription apart from the right to the land itself.⁴

¹ *Tolle v. Correth*, 31 Tex. 362.

² *Broadbent v. Ramsbottom*, 11 Ex. 602; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Gannon v. Hargadon*, 10 Allen, 106; *Curtis v. Ayrault*, 47 N. Y. 73, 78; *Livingston v. McDonald*, 21 Iowa, 160, 166.

³ *Broadbent v. Ramsbottom*, *supra*; *Rawstron v. Taylor*, *Id.* 369.

⁴ *Chasemore v. Richards*, 7 H. L. Cas. 349, overruling *Balston v. Bensted*, 1 Camp. 463.

If the course of subterranean water be defined and known, as is the case with streams which sink under ground, pursue for a short distance a subterraneous course, and then emerge again, the owner of the land lower down has the same rights as he would have if the stream flowed entirely above ground.¹ But, if the underground water be merely percolation, there can be no breach of duty in cutting it off from a lower or adjoining land-owner. For example: The defendant, a land-owner adjoining the plaintiff, digs on his own ground an extensive well for the purpose of supplying water to the inhabitants of a district, many of whom have no title as land-owners to the use of the water. The plaintiff has previously for more than sixty years enjoyed the use of a stream (for milling purposes) which was chiefly supplied by percolating underground water, produced by rainfalls; which water now, after the digging of the well, is cut off and fails to reach the stream. The defendant's act is no breach of duty to the plaintiff.²

§ 4. OF POLLUTION OF STREAM.

If the water of a stream be polluted, or otherwise rendered useless or perhaps materially less useful than it was before, whether it be surface or sub-surface water, and damage ensue to a lower or adjoining owner, he can maintain an action therefor, unless a right to do the thing has been acquired by grant or prescription.³ In the case of a

¹ *Dickinson v. Grand Junc. Canal Co.*, 7 Ex. 282.

² *Chasemore v. Richards*, *supra*. See, also, *Chase v. Silverstone*, 62 Maine, 175; *Wilson v. New Bedford*, 108 Mass. 261; *Frazier v. Brown*, 12 Ohio St. 294; *Hanson v. McCue*, 42 Cal. 303. In New Hampshire, the rule of law is different; and the doctrine prevails that the right to cut off the percolating water depends upon the reasonable use of the soil. *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439.

³ *Wheatley v. Chrisman*, 24 Penn. St. 298; *O'Riley v. McCheeney*, 3 Lans. 278; *Merrifield v. Worcester*, 110 Mass. 216.

legislative authority to pollute the waters of a stream, however, this doctrine is to be taken with qualification. It has been laid down as to such cases that a city is not liable for polluting by sewage the water of a stream, which it has a right to use for that purpose, so far as the effect is the necessary result of the system of drainage adopted by the city ; but it is otherwise if the pollution be attributable to the negligence of the city either in managing the system or in the construction of the sewers.¹

¹ *Merrifield v. Worcester, supra.*

CHAPTER XIII.

NUISANCE.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty (1) to forbear to obstruct or impair the use of the public ways or waters in such a manner as to produce a special prejudice to B; (2) to forbear to flow the land of B with water collected upon his own land, or by changing the course of currents;¹ (3) to forbear to cause or suffer the existence upon his own premises of any thing not naturally there which produces a special prejudice to B; (4) to forbear to endanger the life or health of B, or to disturb his physical comfort in a special degree in the use of his (A's) premises; (5) to forbear to commit acts of indecency or other acts, to the disturbance of B's peace of mind, such as would be likely to affect similarly all persons of the State.

OBSERVATIONS.

1. Public nuisances are indictable nuisances, being committed (1) in the public ways or waters, or (2) on private premises to the prejudice of a multitude of people.

2. Private nuisances are non-indictable nuisances, being committed on private premises to the prejudice of one person, or but a few persons, of the neighborhood.

§ 2. OF WHAT CONSTITUTES A NUISANCE.

To determine what constitutes a nuisance, so as to render the author of it liable to a neighbor in damages, a

¹ See, however, p. 241.

variety of considerations must often be taken into account; especially where the act in question has been committed in a populous neighborhood, in the prosecution of a manufacturing business. And, even if the business itself be unlawful, it does not follow that a private individual can call for redress by way of a civil action for damages. Whether he can do so or not will depend upon the question whether he has sustained a special damage, by reason of the thing alleged to be a nuisance.

Even supposing the nuisance not to be a public one, that is, not to seriously affect the rights of the public in general, much difficulty arises in determining when the business carried on upon neighboring premises, either in itself or in the manner of conducting it, is so detrimental as to subject the proprietor or manager to liability in damages. And this difficulty was until recently increased by certain inexact terms used in the old authorities. It was said that if a business was carried on in a "reasonable manner," an action for damages could not be maintained, though annoyance resulted; and the term "reasonable manner" was explained as meaning that the business was to be carried on merely in a *convenient* place. That is, a trade was not to be treated as a nuisance if carried on in the ordinary manner in a convenient locality. The result was often to bestow upon a manufacturer the right to ruin his neighbor's property, provided only his business was carefully conducted in a locality convenient for its management.¹

Recent English authorities have, however, removed this latter element of difficulty, or rather of hardship upon the sufferer, by declaring that, when no prescriptive right is proved, the true meaning of the term "convenient," as used by the older authorities, lies in the consideration whether the plaintiff has suffered a visible detriment in his

¹ Comyns's Digest, Action upon the Case for a Nuisance, C; Hole v. Barlow, 4 Com. B. N. S. 334.

property by reason of the management or nature of the defendant's business: if he has, the defendant is liable. Convenience is a question for the neighbor and not for the manufacturer; and visible damage to the neighbor's property shows that the business is carried on at an inconvenient place.¹ For example: The defendants are proprietors of copper-smelting works in the plaintiff's neighborhood, where many other manufacturing works are carried on. The vapors from the defendant's works, when in operation, are visibly injurious to the trees on the plaintiff's estate; the defendants having no prescriptive right to carry on their business as and where they do. The defendants are guilty of a breach of duty to the plaintiff, for which they are liable in damages; though, for the purposes of manufacturing, the business is carried on at a convenient place.²

However, a person living in a populous neighborhood must suffer some annoyance: that is part of the price which he pays for the privileges which he may enjoy there. He cannot, therefore, bring an action for every slight detriment to his property which a business in the vicinity may produce. Or, to state the case in the language of judicial authority, if a man live in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man live in a street where there are numerous shops, and a shop be opened next door to him, which is carried on in a fair and reasonable way, he

¹ *Bamford v. Turnley*, 3 Best & S. 66; *Carey v. Ledbitter*, 13 Com. B. N. s. 470; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; s. c. *Bigelow's L. C. Torts*, 454.

² *St. Helen's Smelting Co. v. Tipping*, *supra*.

has no ground of complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that occupation is a material injury to property, the case is different.¹

It should be observed in this connection that the plaintiff is not precluded from recovering by reason of the fact that he had notice of the existence of the nuisance when he located himself near it. If the thing complained of be unlawful—if there be no prescriptive right to do it—the doer cannot set up notice to escape liability.² For example: The defendant is a tallow chandler, carrying on his business in a certain messuage, in such a manner as to convey and diffuse noxious vapors and smells over premises adjoining, which the plaintiff takes possession of while the defendant is carrying on his business. The defendant is liable.³

At common law, by many authorities, the duty not to flood a neighbor's premises by water collected upon a man's own land, or by changing the course of currents, is of a more exact nature. No one can have any better right to throw water upon another's land, without permission, than he has to make an entry therein without permission. Such an act might be treated as a trespass, and therefore redressible, though no damage had been sustained; for otherwise a right to flow the water there might eventually be acquired by prescription, to the substantial confiscation of the particular piece of land. For example: The defendant erects an embankment upon his land, whereby the surface-water accumulating upon the plaintiff's land is prevented from flowing off in its natural courses,

¹ The Lord Chancellor in *St. Helen's Smelting Co. v. Tipping*.

² *Bliss v. Hall*, 4 Bing. N. C. 183; *Bamford v. Turnley*, 3 Best & S. 62, 70, 73; *Bigelow's L. C. Torts*, 467.

³ *Bliss v. Hall*, *supra*.

and caused to flow in a different direction over his land. This is a breach of duty for which the defendant is liable to the plaintiff, though the latter suffer no damage thereby.¹

A fortiori, will the flooding of one's neighbor's premises be attended with legal liability when damage is thereby occasioned, and this is true, not only where the water is thrown back by means of a dam, but also where a stream or ditch is caused to overflow by turning into it water not naturally or entirely tributary to it. For example: The defendant, in the course of reclaiming and improving his land, collects the surface-water of his premises into a drain or ditch, and thereby greatly increases the quantity (or changes the manner) of the flow upon the lower lands of the plaintiff, to the latter's detriment. This is a breach of duty, and the defendant is liable for the damage caused.²

So far as this doctrine applies to surface-water, or water flowing through drains or ditches, and not in natural streams, it is by some courts rejected; and it is held that a coterminous proprietor may change the surface of his land by raising or filling it to a higher grade by the construction of dikes or other improvements, though the result be to cause an accumulation of water on adjacent land, and prevent it from passing off. The right of a party to the free control of his land above, upon, or beneath the surface cannot, it is deemed, be interfered with by considerations of injury to others which might be occasioned by the flow of mere surface-water, in consequence of the lawful appropriation of land to a particular use or mode of enjoyment.³

¹ *Tootle v. Clifton*, 22 Ohio St. 247. See, also, *Martin v. Riddle*, 26 Penn. St. 415; *Kauffman v. Giesemer*, *Ib.* 407; *Ogburn v. Connor*, 46 Cal. 346; *Laumer v. Francis*, 23 Mo. 181.

² *Livingston v. McDonald*, 21 Iowa, 160.

³ *Gannon v. Hargadon*, 10 Allen, 106; *Dickinson v. Worcester*, 7 Allen, 19; *Swett v. Cutts*, 50 N. H. 439; *Brown v. Collins*, 53 N. H. 443. Compare Chap. 15, § 2.

For milling purposes, rights are granted, under various restrictions, on the payment of damages, to flood the lands lying along the mill-streams; for the nature of which rights, reference should be made to the local statutes and the judicial interpretations thereof.

With regard to actions for nuisances to personal enjoyment, it appears to be quite clear that for such smells or vapors proceeding from a neighbor's premises as are merely disagreeable, at least when such smells or vapors are the necessary effect of a business properly conducted there, no action is maintainable.¹ The noxious gases must produce some important sensible effect upon physical comfort. A person is, indeed, sometimes said to be entitled to an unpolluted and untainted stream of air for the necessary supply and reasonable use of himself and family; but by the terms "untainted" and "unpolluted" are meant, not necessarily air as fresh, free, and pure as existed before the business in question was begun, but air not rendered to an important degree less compatible, or certainly not incompatible, with the physical comfort of human existence.²

The criterion therefore of liability for a supposed (private³) nuisance, affecting the bodily comfort of the plaintiff, is, whether the inconvenience should be considered as more than fanciful, — more than one of mere delicacy or fastidiousness, — as an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and simple modes of life.⁴

¹ See *St. Helen's Smelting Co. v. Tipping*, *supra*.

² *Walter v. Selfe*, 4 DeG. & S. 315.

³ It is doubtful if the right of action for injury by a public nuisance would stand on different ground; but the court in *Walter v. Selfe* is careful to say that a private nuisance is there spoken of.

⁴ *Walter v. Selfe*, *supra*. See, also, *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392; *Crump v. Lambert*, Law R. 3 Eq. 409.

For example : The defendant erects upon his premises, adjoining the premises of the plaintiff, a kiln for the manufacture of bricks, and in the process of the manufacture the smoke and vapors and floating substances from the kiln are constantly directed to and within the plaintiff's house, so as to materially affect the comfort of himself and family as persons of ordinary habits of life. This is a breach of duty to the plaintiff, though¹ it appear that the health of his family has actually been better since the erection of the kiln than before.¹

It matters not what it is that produces the discomfort : smoke alone may be sufficient ; and the same is true of noxious vapor alone, or of offensive smells alone. Whatever produces a material discomfort to human life in the neighborhood is a nuisance, for which damages are recoverable.²

Liability for disturbance of a person's peace of mind is still more restricted, and appears to be confined to acts such as would produce a like effect upon all persons, such as acts of indecency. If the disturbance complained of be such as, while affecting the plaintiff's mind disagreeably and seriously, would not affect the mind of others, his complaint will not be heard. This is deemed to be the case of mere noise made on the Sabbath, or during religious worship. For example : The defendant disturbs the plaintiff during divine worship in church by making loud noises in singing, reading, and talking. This is deemed to be no breach of duty to the plaintiff.³

Thus far of private nuisances. As to public nuisances, it is to be observed that such become private or personal nuisances as well, by inflicting upon a particular individual

¹ *Walter v. Selfe, supra.*

² *Crump v. Lambert, supra.*

³ *Owen v. Henman*, 1 Watts & S. 548. See, also, *First Baptist Church v. Utica & S. R. Co.*, 5 Barb. 79; *Sparhawk v. Union Pass. Ry. Co.*, 54 Penn. St. 401, cases of public nuisance.

any special or particular damage. For example: The defendant, without authority, moors a barge across a public navigable stream, and obstructs the navigation thereof to the plaintiff, who at the time is floating a barge down the stream. This is a breach of duty to the plaintiff, for which the defendant is liable to him in damages.¹

If, however, the obstruction or invasion of the right be one of like effect upon all persons, producing no particular, actual damage to any individual, no individual can maintain an action for damages by reason of it. In other words, it is necessary to the maintenance of an action for damages for a public nuisance (and the same is true of a private nuisance) that the plaintiff should have suffered actual, specific damage thereby.²

It matters not that the special damage sustained by the plaintiff is common to a large number of individuals, provided it be an actual damage to his property, or injury to his health, or to his physical comfort (as explained in considering private nuisances). The injury inflicted upon private interests is not merged in the wrong done to the general public. For example: The defendants carry on a manufacturing business in such a way as to make themselves liable for causing a public nuisance. The plaintiff's premises are filled with smoke, and his house shaken so as to be uncomfortable for occupation. This is a breach of duty to the plaintiff, for which he is entitled to damages, though every one else in the vicinity suffers in the same manner.³

It is, however, a difficult matter to state what sort of detriment will amount to special damage within the law of

¹ *Rose v. Miles*, 4 Maule & S. 101; s. c. *Bigelow's L. C. Torts*, 460.

² *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *Milhau v. Sharp*, 27 N. Y. 612; *Grigsby v. Clear Lake Water Co.* 40 Cal. 396.

³ *Wesson v. Washburn Iron Co.*, *supra*. See *Francis v. Schoellkopf*, 53 N. Y. 152.

public nuisances. It appears to be necessary in the case of obstructions of public ways or waters that a particular user had been begun by the plaintiff, and that such user was interrupted by the wrongful act of the defendant.¹ Before the complaining party has entered upon the actual enjoyment of the public easement, the wrongful act does not directly affect him, or at least does not affect him in a manner to enable a court to measure the loss inflicted upon him. If he desire to make use of the easement, he can complain to the prosecuting officer of the government, and require him to enter public proceedings against the offender ; or — so it appears — he may proceed to make his particular use of the easement, and if the obstruction be not removed before he reaches it, or in time for him to have the full enjoyment of passage, he may bring an action for the damage which he has sustained in the particular case by reason of the obstruction.

This latter proposition follows from the rule of law already noticed, that the plaintiff is not barred of a recovery in damages by reason of having notice of the existence of the nuisance when he put himself in the way of suffering damage from it.² Such a case does not come within the principle that a consenting party cannot recover for damage sustained by reason of an act the consequences of which he has invited,³ since he has not consented to the act complained of, or invited its consequences. He may have reason to suppose that the obstruction will be removed before he reaches it ; or, if not, he may well say that it is wrongful, and *must* be removed before he reaches it, on pain of damages for any loss which he may sustain by reason of its continuance.

If the obstruction of itself be insufficient to cause any

¹ See *Rose v. Miles*, 4 Maule & S. 101 ; s. c. Bigelow's L. C. Torts, 460.

² *Ante*, p. 240.

³ *Volenti non fit injuria*.

actual damage, it is considered that no right of action can be derived by incurring expense in removing it. For example: The defendant obstructs a public footway, and the plaintiff on coming to the obstruction, in passing along the way, causes the obstruction to be removed; and this is repeated several times. No other damage is proved. The defendant is not liable.¹

It follows that the mere fact that the plaintiff has been turned aside by reason of the obstruction and caused to proceed, if at all, by a different route from that intended by him is not special damage: he must have suffered some specific loss by reason of being thus defeated in his purpose. And this has been held equally true of obstructions to the public wagon roads. For example: The defendant obstructs a public highway leading directly to the plaintiff's farm, and the plaintiff is thereby compelled to go to his land, if at all, with his team, by a longer and very circuitous road; but no specific loss is proved. The defendant is not liable to the plaintiff.²

The case has been thought to be different if the way were of peculiar use to the plaintiff, as by being his only means of reaching his lands with wagon. For example: The defendant, by raising the water of his dam, floods a highway, and renders it impassable; this highway furnishing the only means of ingress and egress to part of the plaintiff's farm in use. The defendant is deemed to be liable in damages to the plaintiff.³

It seems questionable, however, if the plaintiff should be entitled to recover in such a case for the mere obstruction of ingress and egress to his lands. If he can show no other damage, he should call upon the government to redress the wrong as a nuisance to the public. But if, by

¹ *Winterbottom v. Derby*, Law R. 2 Ex. 316.

² *Houck v. Wachter*, 34 Md. 265.

³ *Venard v. Cross*, 8 Kans. 248.

reason of closing the highway, the plaintiff's crops are caused to suffer (access to the land by team being necessary for the care of the same), or if, having cattle or horses and wagons within the tract thus cut off, he cannot bring them away, and damage ensue, he would clearly be entitled to require the offender to compensate him.¹

¹ It is, therefore, worthy of doubt whether the fact that the plaintiff has been incommoded in a different manner from the rest of the public be always sufficient to entitle him to sue for damages. If still that inconvenience do not result in specific loss to him, he can hardly have sustained "special damage."

CHAPTER XIV.

DAMAGE BY ANIMALS.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty to prevent his animals from doing damage to B, if he has notice of their propensity to do damage.

§ 2. OF NOTICE OF PROPENSITY TO DO DAMAGE.

Whoever keeps an animal with notice that it has a propensity to do damage is liable to any person who, without fault of his own contributing to the injury, suffers an injury from such animal; and this, though the keeper be not guilty of negligence in regard to properly or securely keeping it. The gist of liability for the damage is the keeping of the animal after notice of the evil propensity. For example: The defendant has a monkey, which he knows is accustomed to bite people. The plaintiff, without fault of her own, is bitten by the animal. The defendant is liable, however careful he may have been in keeping the monkey.¹

If the animal be *feræ naturæ*, it will (probably) be presumed that the defendant had notice of any vicious propensity whereby the plaintiff has suffered injury, since it is according to the nature of such an animal to do damage.²

¹ *May v. Burdett*, 9 Q. B. 101; s. c. *Bigelow's L. C. Torts*, 478. See *Jackson v. Smithson*, 15 Mees. & W. 563; *Popplewell v. Pierce*, 10 Cush. 509; *Oakes v. Spaulding*, 40 Vt. 347; *Card v. Case*, 5 Com. B. 622.

² If a wild animal has been tamed and domesticated, the case may be different.

And even if the animal be domestic, the owner will be presumed to have notice of any propensity which is *secundum naturam* of the animal. For example: The defendant's cattle stray into the plaintiff's garden, and beat and tear down the growing vegetables. The defendant is liable, though not guilty of negligence; since it is of the nature of straying cattle to do such damage.¹

In the case of injuries committed by domestic animals *contra naturam*, it is clear that the owner is not liable if he had no notice of the propensity.² For example: The defendant's horse kicks the plaintiff, neither the plaintiff nor the defendant being at fault, and the defendant having no notice of a propensity of the horse to kick. The defendant is not liable; since it is not of the nature of horses to kick people, when not provoked to the act.³

Statutes have been quite generally passed, declaring it unnecessary in an action against the owner of a dog to prove a previous propensity of the animal to injure sheep or cattle. In the absence of statute, however, the rule requiring notice of the vicious propensity prevails as to dogs as well as with regard to other domestic animals.⁴

While, however, negligence in the owner of the animal is not necessary to constitute a breach of duty when the *scienter* can be proved, negligence in the care of the animal will (probably) render the owner liable, though he did not know of the propensity.

It must at the same time be understood that the right of redress of the injured person will be defeated if the injury was caused by his own fault. A person who irritates an

¹ See *Cox v. Burbridge*, 13 Com. B. n. s. 430, 438, Williams, J.

² Bigelow's L. C. Torts, 490.

³ *Cox v. Burbridge*, *supra*. The plaintiff was a child playing in the highway at the time of the injury, but there was no evidence that he had done any thing to irritate the horse.

⁴ Bigelow's L. C. Torts, 490.

animal, and is bitten or kicked in turn, is deemed in law to have consented to the damage sustained, and cannot recover. But if the fault of the injured party had no necessary or natural and usual connection with the injury, operating to produce the injury as cause produces effect, the owner of the animal will be liable. For example: The defendant keeps upon his premises a ferocious dog, and the plaintiff, having no notice that such a dog is there, trespasses in the day-time upon the premises, and the dog rushes upon him and bites him. The defendant is liable;¹ since it is not the necessary or natural and usual consequence of a person's trespassing upon a man's premises by day that he should be attacked by a savage dog.

If, however, the plaintiff had notice that the vicious animal was loose upon the premises, the case would be different, since it would be the natural and usual result of trespassing upon the land that the animal would attack the trespasser. And if a person were to venture upon another's premises in the country as a trespasser in the night-time, it might perhaps be considered that he had entered with notice of danger, since it is not unusual for people in the country to keep watch-dogs upon their lands. But, if the trespasser were not engaged in mischief or reasonably suspected of mischievous intent, the owner would have no right to set his dog upon the person before notice to leave the premises, even if he would after notice; for a wilful, wanton, and unnecessary injury done to a man or even to his beast, though trespassing, cannot be justified.² Necessary force to resist the entry, or eject the trespasser after his wrongful entry, is the utmost which the law allows the owner or occupant of the premises.³

¹ *Loomis v. Terry*, 17 Wend. 496. ² See *Loomis v. Terry*, *supra*.

³ *Ib.* This would be another way also of explaining the right of the trespasser to recover when, having entered without notice, he is attacked and bitten by the dog without the direct command of the owner.

§ 3. OF ESCAPE OF ANIMALS.

By the common law of England and of most of the American States, the owner of land is bound to keep it fenced; and if his cattle escape and get into his neighbor's premises, he is liable for the damage done, whether the escape was owing to his negligence or not. For example: The defendant is an adjoining land-owner to the plaintiff. Their lands have been separated by a partition fence, but part of it has been carried away by high water a year before the wrong complained of took place. The defendant, knowing of the condition of the fence (which the plaintiff is equally bound to repair), turns his cattle in upon the adjoining close, whence they escape into the plaintiff's close and destroy his corn. The defendant is liable.¹ Again: The defendant's horse bites and kicks the plaintiff's horse through the partition fence between the plaintiff's and defendant's premises. The defendant is liable, though not guilty of negligence.²

This common-law duty has, however, been variously modified by statute in this country. And the English common law itself is held inapplicable to the state of the country in some of the Western States.³

¹ *Myers v. Dodd*, 9 Ind. 290; *Webber v. Closson*, 35 Maine, 26.

² *Ellis v. Loftus Iron Co.*, Law R. 10 C. P. 10.

³ 3 Kent's Com. 438, note 1 (12th ed.); *Kerwhacker v. Cleveland &c. R. Co.*, 3 Ohio St. 172.

CHAPTER XV.

ESCAPE OF DANGEROUS ELEMENTS OR SUBSTANCES.

§ 1. INTRODUCTORY.

*Statement of the duty.*¹ A owes to B the duty to prevent the escape of any dangerous thing, to the damage of B, brought or made upon the premises of A; the escape being due to defects within the control, though not within the knowledge, of A.

§ 2. OF THE NATURE OF THE PROTECTION REQUIRED.

The duty considered in the preceding chapter of restraining animals from doing damage has been treated in England as furnishing ground for an analogous duty with reference to inanimate things of a peculiarly dangerous character, which the occupant of premises has brought or made thereon, — the duty, to wit, of so keeping such things that they shall not do mischief to the occupant's neighbor; within limitations now to be stated.

In the language, substantially, of judicial authority, where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner, he will not be liable in damages, though mischief should thereby be occasioned to his neighbor. But if he bring upon his land any thing which would not naturally come there, the thing being in itself dangerous, and likely to do mischief if not kept under proper control, he will be liable for any mischief thereby produced, though in doing so he may act without

¹ This statement is deduced from the English authorities. What the American law is, is not clear, as will be seen *infra*.

personal wilfulness or negligence. For example: The defendants construct a reservoir on land separated from the plaintiff's colliery by intervening land. Mines under the site of the reservoir, and under part of the intervening land, have been formerly worked; and the plaintiff has, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It has not been known to the defendants, or to any person employed by them in the construction of the reservoir, that such communication exists, or that there have been any old workings under the site of the reservoir; and the defendants have not been personally guilty of any negligence. The reservoir is in fact, but without the defendants' knowledge, constructed over five old shafts, filled with rubbish and other loose material, and leading down to the workings; and having been filled with water, the water bursts down these shafts and flows by the underground channel into the plaintiff's mines, producing damage. The defendants are liable.¹

The owners of the upper tenement have, however, in such cases, a right to work their premises in the ordinary, reasonable, and proper manner, and are not liable for the effects of water which flows down into the lower tenement by mere force of gravitation. But where some unusual and extraordinary effort is put forth for effecting the occupant's purpose, he is liable for the injurious results which follow.² For example: The defendant, owner of a coal mine above the plaintiff's mine, works out the whole of his coal, leaving no barrier between his mine and the plaintiff's, the consequence of which is, that the water

¹ *Rylands v. Fletcher*, Law R. 3 H. L. 330; s. c. Law R. 1 Ex. 265, reversing 3 Hurl. & C. 774.

² *Ib.*; *Smith v. Fletcher*, Law R. 9 Ex. 64, reversing Law R. 7 Ex. 305; *Baird v. Williamson*, 15 Com. B. n. s. 376.

percolating through the upper mine flows into the lower one, and obstructs the plaintiff in getting out his coal. This is no breach of duty to the defendant; the water having flowed down in its natural course, and the defendant being entitled to remove all of his coal.¹ Again: The defendant, under the like circumstances, does not merely suffer the water to flow through his mine in its natural way, but, in order to work his mine beneficially, pumps up quantities of water which pass into the plaintiff's mine, in addition to that which would naturally have reached it, whereby the plaintiff suffers damage. This is a breach of duty to the plaintiff, though it is done without negligence, and in the due working of the defendant's mine.²

If the damage be produced by *vis major* or by the act of God, or otherwise, without the intervention of acts of the occupant or of those for whom he is responsible, the case will be different, although the occupant may have brought the dangerous element or thing upon his premises. In the example given, if the damage had been caused by lightning bursting the reservoir, and not by reason of the existence of the openings into the lower mines, the defendants would not have been liable. Again: The defendant's tenants, the plaintiffs, occupy the lower story of a warehouse, of which the defendant occupies the upper. A hole has been gnawed by rats through a box into which water from the gutters of the building is collected, to be thence discharged by a pipe into the drains. The water, now pouring through the hole, runs down and wets the plaintiffs' goods. The defendant is not liable.³ Again: The defendant owns premises on which stand yew-trees,

¹ *Smith v. Kenrick*, 7 Com. B. 564.

² *Baird v. Williamson*, *supra*.

³ *Carstairs v. Taylor*, Law R. 6 Ex. 217; *Ross v. Fedden*, Law R. 7 Q. B. 661. See *Doupe v. Genin*, 45 N. Y. 119. But see *Marshall v. Cohen*, 44 Ga. 489.

which, to his knowledge, are poisonous. A third person clips some of the branches, which fall upon the plaintiff's land, and poison the latter's horses. The defendant is not liable.¹

If, too, the bringing the dangerous element upon the occupant's land, and all the works connected therewith, be effected under sanction of legislative authority, the fact that they result in damage to the party's neighbor by purely natural escape or by authorized channels, and not by reason of negligence attributable to the occupant, will not render the occupant liable.² It is also certain that, if the escape be caused by the act of God, no liability follows. For example: The defendant is charged by law with the duty of maintaining water tanks in his district for purposes of irrigation, as part of a national system of irrigation, for the welfare of the people. By reason of an extraordinary flood, and not by reason of the bad condition of the works, one of these tanks gives way, causing damage to the plaintiffs. The plaintiffs cannot recover therefor.³

On the other hand, if the works be of a nature to require legislative sanction, the proprietor or manager, when not having it, will be liable for damage produced by any escape or breaking thereof, however occurring. For example: The defendants make use of locomotive engines, without having obtained the necessary authority of law, and the plaintiff suffers damage by reason of fire proceeding from the same. The defendants are liable, though not guilty of any negligence in the management of the engines, and though they would not have been liable had they had the proper authority.⁴

¹ *Wilson v. Newberry*, Law R. 7 Q. B. 31.

² See *Vaughan v. Taff Vale Ry. Co.*, 5 Hurl. & N. 679.

³ *Madras Ry. Co. v. The Zemindar*, Law R. Ind. App. 364.

⁴ *Jones v. Festiniog Ry. Co.*, Law R. 3 Q. B. 733; *Vaughan v. Taff Vale Ry. Co.*, *supra*.

The foregoing is to be understood as a statement of the law of England. The American authorities upon this subject are not in perfect accord, though not many of them appear to be at variance with those of England. It is held in some States that, if a person cut off the flow of surface-water, he has no right to burden his neighbor's premises with the back-flow,¹ or with new streams of water.² So, one who, in the course of reclaiming and improving his land, collects the surface-water of his premises into a drain or ditch, and thereby greatly increases the quantity or changes the manner of the flow upon the lower lands of his neighbor, is by some courts held liable for the damage occasioned.³ These, however, are different cases from those above presented. In neither of them is the purpose of the defendant to collect the water upon his own premises for use there. In the first case, the act may have no reference to the flow of water, as where the water is cut off by the construction of an embankment upon which to lay the tracks of a railroad.⁴ In the second case, the object is to get rid of, and not to collect, the water. Such cases may therefore be treated as cases of nuisance.⁵

It has also been decided in this country that the occupant of premises may be liable for damage caused by the fall of ice or snow from the roof of his building when the roof is so constructed as to make it substantially certain that, if the snow be not removed, accidents from snow-slides will occur; although the roof be constructed in the usual manner of the times.⁶ And with regard to water

¹ Gillham v. Madison R. Co., 49 Ill. 484. As to the rule in Massachusetts and New Hampshire, see Gannon v. Hargadon, 10 Allen, 106; Dickinson v. Worcester, 7 Allen, 19; Swett v. Cutts, 50 N. H. 439; *ante*, pp. 240, 241.

² Tootle v. Clifton, 22 Ohio St. 247.

³ Livingston v. McDonald, 21 Iowa, 160.

⁴ Gillham v. Madison R. Co., *supra*.

⁵ *Ante*, p. 241.

⁶ Shipley v. Fifty Associates, 106 Mass. 194.

collected in reservoirs, it is held that the embankments must be so thoroughly constructed that the water cannot percolate through them.¹

The doctrine has also been laid down in this country that where the alleged rights of adjoining land-owners conflict, it is better that one of them should yield to the other and forego a particular use of his land, rather than, by insisting upon that use, deprive the other altogether of the use of his property; which might often be the consequence of carrying on the operation. This would, of course, be an obvious principle if stated with regard to a nuisance; but it is treated as applicable to other wrongs as well. For example: The defendants, in the course of digging a canal through their land, for which purpose they are clothed with legislative authority,² find it necessary to blast rocks by the use of gunpowder. The result of the blasting is to throw fragments of rock against the plaintiff's house, whereby the plaintiff suffers damage. The defendants are deemed liable, though not guilty of negligence.³

A distinction has, however, been observed to exist between an injury sustained in that way and one sustained by the explosion of a boiler on the defendant's premises. For damage sustained in the latter way, it is deemed that no right of action arises unless the explosion was due to negligence of the manager.⁴ The use of a boiler is not necessarily dangerous.

It will thus appear that the American law with regard to this important subject of the escape of dangerous elements, not attributable to negligence, cannot be said to have taken

¹ *Wilson v. New Bedford*, 108 Mass. 261; *Pixley v. Clark*, 35 N. Y. 520.

² The work could not therefore be a nuisance when carefully conducted.

³ *Hay v. Cohoes Co.*, 2 Comst. 159.

⁴ *Loosee v. Buchanan*, 51 N. Y. 476. The English doctrine above presented is denied in this case.

distinct form. The English doctrine is itself a new feature of the English law, and it remains to be seen whether it will be fully engrafted upon the American jurisprudence.

It should be observed, however, that, in the absence of negligence, liability arises by the English law apparently only (1) when the thing which escapes is obviously dangerous, and (2) when the escape was due to defects within the control of the owner or manager.

Nitro-glycerine is an obviously dangerous substance; and to bring a quantity of it upon a man's premises would be a great exposure to others, however carefully it were kept. Hence if it should escape to the damage of a neighbor, and that escape should be due to a defect within the control of the manager, he would be liable for the damage; though he had exercised the greatest care over it, and was not guilty of negligence in failing to discover the existence of the defect whereby it escaped. It is sufficient that that defect was such that, if the manager had known of its existence, he might have prevented the damage.

On the other hand, a pile of lumber, properly made, is obviously not dangerous; and hence if it should topple and fall upon the adjoining close by reason of a defect in the foundation or of the sinking of the soil, without fault of the occupant, he could not be liable.

A house, likewise, is obviously not dangerous when in ordinary condition for occupancy; and hence if it should fall, to the injury of the adjoining owner, he would be without redress, in the absence of negligence on the part of the occupant. And perhaps the same might be said of a scaffolding erected on the side of the house. Such a work is not obviously dangerous, when properly constructed.

Again, if there be no defect in that which contains or supports the dangerous substance, or if there be a defect not within the control of the occupant, of which defect he has no notice, he cannot be liable. A reservoir might be

constructed over the course of an underground stream which had become dry, the intervening soil not being sufficiently firm to support the weight of water accumulated above ; but, if the owner of the reservoir had no notice of the defective condition of the soil, he could not be liable for damage caused by the sinking of the work and the escape of the water.

If this be the effect of the English doctrine, as appears to be the case, its reasonableness can scarcely be questioned, and its acceptance in America may be expected.

CHAPTER XVI.

NEGLIGENCE.

§ 1. INTRODUCTORY.

Statement of the duty. A owes to B the duty to forbear to inflict damage upon him, by acts or omissions not in conformity with the conduct of a prudent or careful or diligent man, though damage be not actually intended.

Liability *ex delicto* for the consequences of negligence arises by reason only of acts, or omissions after the doing of acts. In respect of omissions not preceded at any time by overt acts (either by the defendant or by his predecessors in interest) in connection with that which occasions the damage, though there may be liability *ex contractu* (the omission being a breach of contract), there can be no liability in tort, as for negligence. An innkeeper may be liable for refusing to receive a man as guest into his inn, and a carrier may be liable for refusing to receive a person as passenger or a package as freight; but the liability incurred cannot properly be treated as growing out of negligence. Refusal to do a duty is one thing; negligence is another.

There can arise indeed no civil liability for the negligent omission to do a thing required by law, though commanded by the Legislature, unless that neglect be connected with the existence of something already done. A town may be required to build a bridge across a stream, but no one can maintain an action for damages against the town for a neglect to build the bridge, however inexcusa-

ble that neglect; though an action might be maintained for damage caused by a failure to *repair* a bridge which the town was bound to keep in proper condition. In the latter case, there is an omission preceded (at some time) by an overt act; to wit, the building of the bridge. When it is said that no action *ex delicto* can be maintained for a pure non-feasance, consisting in neglect of duty, the former case is to be understood as intended.

It is conceded by all of the authorities that the standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man. But, if not properly understood, this standard will itself sometimes be misleading. A blacksmith finds a watch by the roadside, and on opening it and seeing that it is full of dirt, attempts to clean it and put it in proper order; but in doing so, though exercising the greatest care, he injures it by reason of his lack of skill. Now in attempting to put the watch in order, and thus perhaps preventing its ruin, he has done nothing that a prudent man might not have done; and, taking the criterion in its broadest sense, the blacksmith could not be liable to the owner of the watch for the damage which he did to it; while the law would probably be just the contrary.

A prudent *blacksmith*, however, would not have undertaken to put the watch in order; only a watchmaker, or a person skilled in the repair of watches, would, in prudence, undertake such a thing. The prudent man, therefore, with regard to *undertaking* an act, is the man who has acquired the skill to do the act which he undertakes: a man who has not acquired that special skill is imprudent in undertaking to do the act, however careful he may be, and however great his skill in other things of a different nature.¹

The criterion then of the conduct of the prudent or care-

¹ See *Dean v. Keate*, 3 Campb. 4.

ful or diligent man in the *undertaking* of an act is to be understood with the limits suggested. The question to be raised with regard to a man's conduct brought in question in such a case is, whether a prudent or careful or diligent man of his calling or business or skill would have undertaken to do the thing in question; supposing the party to have exercised due care in executing the work undertaken.

When an act has been undertaken by a person whose business or profession covers the doing of acts of the kind in question, the question to be decided is, whether that skill or care or diligence has been exercised which a prudent man of the same business would have exercised in the same situation.

In regard to omissions (after overt acts) to perform acts not distinctly and certainly required by law, the question of the duty to perform them is to be decided by the general practice of prudent or careful or diligent men of the same occupation, when such a practice exists. When no such practice exists, the question is decided upon the reasonably supposable conduct of the prudent man acting under the circumstances.¹

If the act not performed be required by law, the question of the conduct of the prudent man becomes immaterial: non-performance, followed by damage, affords *prima facie* a right of action for the failure.

It is no part of the purpose of this work to consider the proper province of the court and jury; but in regard to the subject of negligence it is important to observe that there is much confusion of authority upon the question whether the court or the jury should determine if the conduct of the defendant (when that is in question) has conformed to the standard of the prudent or careful or skilful man as above explained. It is clear, however, by most of the

¹ See *Dixon v. Bell*, 5 Maule & S. 198; s. c. *Bigelow's L. C. Torts*, 568.

authorities, that where the facts are found, and it is perfectly manifest that a prudent man would or would not do as the defendant has done, the court may rule accordingly, or rather may direct the jury to find accordingly. The same is also true where the law has prescribed the nature of the duty, and also where there exists a well-known practice in the community, of a proper character. In other cases, the inference concerning negligence is left to the jury.¹

It remains to consider the specific phases under which liability for negligence may arise: and these are to be classed under two general heads; to wit, negligence in the performance of contracts, and negligence not connected with contract. For it is to be understood, with regard to the first class of cases, that the negligent performance of a contract, or the unexcused neglect to perform a contract, is a breach of duty that may be treated as involving liability *ex delicto* or *ex contractu*, at the election of the injured party.²

Under the first head, it will be necessary to consider the subjects of Innkeeper and Guest, Bailor and Bailee, Professional Services, Telegraph Companies, and the duties of Agents, Servants, Trustees, Officers, and the like, to their superiors; and, under the second head, the Use of Premises. After all of these subjects have been examined, it will remain to consider the subjects of Notice and Contributory Negligence.

§ 2. OF INNKEEPER AND GUEST.

With regard to the duties of innkeepers, it will be almost sufficient in the present connection to say that, though it

¹ See upon this subject Bigelow's L. C. Torts, 589-596.

² *Marzetti v. Williams*, 1 Barn. & Ad. 415; *Boorman v. Brown*, 11 Clark & F. 1; s. c. 3 Q. B. 511; *Robinson v. Threadgill*, 13 Ired. 39. These cases appear to go to the extent of allowing suit *ex delicto*, even when there has been no attempt to perform the contract.

has sometimes been considered that for loss or damage to the goods of guests liability depends upon the question of negligence in the host, or in his servants acting for him,¹ it is now more generally considered that an innkeeper's liability for the failure to keep the goods of his guest safely, when once delivered into the former's custody, arises independently of the question of negligence. By the general current of authority, the host is liable for damage to or loss of the goods of his guest put in his (the host's) custody, though he exercised the greatest diligence in the care of them, unless the loss occur by the guest's negligence, or by *vis major*, inevitable accident, or the act of God.²

It follows, *a fortiori*, that the innkeeper is liable in case of loss sustained by reason of his own negligence, or that of his servants; but, inasmuch as the question of his liability does not turn upon the question of negligence, the subject need not be here pursued.³

It is proper, however, to observe in this connection that, if the negligence of the guest occasion the loss in such a way that it would not have happened if the guest had exercised the usual care that a prudent man might be reasonably expected to have taken under the circumstances, the innkeeper is not liable.⁴

¹ Dawson v. Chamney, 5 Q. B. 164; Merritt v. Claghorn, 23 Vt. 177; Metcalf v. Hess, 14 Ill. 129.

² Armistead v. Wilde, 17 Q. B. 261; Cashill v. Wright, 6 El. & B. 891; Morgan v. Rarey, 6 Hurl. & N. 265; Oppenheim v. White Lion Hotel Co., Law R. 6 C. P. 515; Shaw v. Berry, 31 Maine, 478; Norcross v. Norcross, 53 Maine, 163; Sibley v. Aldrich, 33 N. H. 553; Manning v. Wells, 9 Humph. 746; Thickstun v. Howard, 8 Blackf. 535; Berkshire Woollen Co. v. Proctor, 7 Cush. 417; Cohen v. Frost, 2 Duer, 341; Piper v. Manny, 21 Wend. 282; Hunlett v. Swift, 33 N. Y. 571; Wilkins v. Earle, 44 N. Y. 172; Houser v. Tully, 62 Penn. St. 92; Rockwell v. Proctor, 39 Ga. 105. ³ See Chs. 17, 18.

⁴ Cashill v. Wright, 6 El. & B. 891; Oppenheim v. White Lion Hotel Co., Law R. 6 C. P. 515.

§ 3. OF BAILOR AND BAILEE.

So much of the subject of bailment as relates to breaches of duty by common carriers belongs to the subsequent chapters. The liability of a common carrier is similar to that of an innkeeper, and does not turn upon the question of negligence, — the subject of the present chapter.

It was long considered a settled doctrine of the English law that the duty of bailees was to be distributed under three heads, having reference respectively to the nature of the bailment; to wit, (1) the duty to observe very great care, (2) the duty to observe ordinary care, and (3) the duty to observe slight care only. Conversely, therefore, the bailee was deemed to be liable for loss sustained by the bailor, under the first head, if the bailee were guilty of slight negligence; under the second head, if he were guilty of "ordinary negligence," or rather probably of negligence of an intermediate grade; and, under the third head, if he were guilty of gross negligence.¹

The application of these three degrees of negligence was thus explained: If the bailment were gratuitous, by the bailor, that is, for the sole benefit of the bailee, the bailee was deemed to be liable for loss or damage to the subject of the bailment occasioned even by slight negligence on his part. If the bailment were for hire, that is, for the mutual benefit of the bailor and the bailee, he was deemed to be liable for the consequences of negligence of an intermediate grade only. If the bailment were without benefit to the bailee, that is, if the bailor had requested the bailee to take care of his, the former's, goods without reward, the bailee was deemed to be liable for the result of gross negligence only.²

This doctrine arose from a misconception of the Roman

¹ *Coggs v. Bernard*, 2 *Ld. Raym.* 909; 1 *Smith's L. C.* 188 (7th Eng. ed.).

² *Ib.*

law of bailment, the doctrines of which were resorted to in order to assist in the solution of a question which arose in England in the eighteenth century.¹ But it remained in the English law unchallenged for so long a period that it has not been readily abandoned, and it may be still considered as retaining somewhat of vitality in England, and in various parts of the United States.

The tendency of authority at the present time is to break away from this division of negligence, and to accept the true doctrine of the Roman law in regard to bailments as well as in relation to other subjects covered by the title Negligence. The effect is to make the criterion of liability to depend upon the consideration stated on a preceding page ;² to wit, whether the party complained of conducted himself in the particular situation as a man of prudence or carefulness or skill, of the same business, would have conducted himself, or as prudent or careful or skilful men, of the same business, generally do conduct themselves in the like situation.³

This criterion will indeed be often if not generally found to be the real test applied in those cases in which the old terms are used. For example : The defendant, a bailee of money to keep without reward, gives the following account of its loss : He was a coffee-house keeper, and had placed

¹ *Coggs v. Bernard*, *supra*. The error of Lord Holt in this famous case has often been pointed out. Story, Agency, § 184, note, Green's ed. ; Wharton, Negligence, § 57, *et seq.*

² *Ante*, p. 261.

³ As indicating the tendency to discard the old theory of the three degrees of negligence, see *The New World*, 76 How. 469 ; *Milwaukee R. Co. v. Arms*, 91 U. S. 494 ; *Wilson v. Brett*, 11 Mees. & W. 113 ; *Hinton v. Dibdin*, 2 Q. B. 650 ; *Grill v. General Collier Co.*, Law R. 1 C. P. 600 ; *Beal v. South Devon Ry. Co.*, 3 Hurl. & C. 337 ; *Giblin v. McMullen*, Law R. 2 P. C. 328 ; *Cass v. Boston & L. R. Co.*, 14 Allen, 448 ; *Lane v. Boston & A. R. Co.*, 112 Mass. 455 ; *Briggs v. Taylor*, 28 Vt. 180.

the money in question in his cash box in the tap-room, which had a bar in it, and was open on Sunday; and on a Sunday the cash box was stolen. The defendant's liability turns upon the question whether he has taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; if not, he is deemed to be guilty of "gross negligence" and liable for the loss.¹ Again: The defendants receive a deposit from a stranger, S., to be kept without reward. Subsequently another stranger calls for the bonds, representing himself to be S., the depositor. The judge instructs the jury that, if the defendants are guilty of want of "ordinary care" under all the circumstances, they are liable, otherwise not. The instruction is correct, being equivalent to a ruling that the defendants are liable for gross negligence only.² Again: The defendants receive a deposit of debentures to be kept without reward, and the cashier of the bank fraudulently abstracts the same and makes away with them. The defendants are liable if they have failed to exercise "ordinary care," which means a failure to exercise that ordinary diligence which a reasonably prudent man takes of his own property of the like description.³

The foregoing are examples of liability in cases of custody without compensation; but the same principles prevail in cases of deposit for hire. For example: The defendants, warehousemen for hire, lose by theft the plaintiff's property while the same is in their custody. They have exercised the same degree of care over the property that is usually exercised in the vicinity by other like ware-

¹ *Doorman v. Jenkins*, 2 Ad. & E. 256. The question, it will be seen, was not whether the defendant had taken the same care of the money that he took of his own.

² *Lancaster Co. Bank v. Smith*, 62 Penn. St. 47. See, also, the language of the court in *Foster v. Essex Bank*, 17 Mass. 479, 486.

³ *Giblin v. McMullen*, Law R. 2 P. C. 317.

housemen. The defendants are not liable, having exercised "ordinary care."¹ Again: The defendants, warehousemen in a large city, receive for reward from the plaintiffs, a large quantity of salt in barrels, which they store in a loose frame warehouse, situated on an alley, back of their business house. Of the whole amount, about two hundred and forty barrels are stolen; and it is afterwards discovered that the theft had been going on at intervals for a month. It was effected by entering through an opening in the side of the building, a plank being off, and then opening the alley door, and rolling out the barrels. Drays were thus loaded early in the morning, sometimes before sunrise, sometimes a little after; the defendants having no watchmen there. The defendants are liable for failing to use "ordinary care or diligence;" though it appear that it is usual in the city of the defendants to pile such barrels in open sheds, or on vacant lots, or on the sidewalk, or occasionally in warehouses such as the one in question, — some supervision or examination of the premises being reasonably required in the course of a month.²

The result, therefore, of the general current of authority is, that the terms "gross negligence," or "negligence," are, with regard to goods bailed, now used to prescribe liability where the defendant or his servants have not taken the same care of the property intrusted to them as a prudent man would have taken of his own in the same situation.³ Or as it has recently been laid down by judicial authority: For all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence, is "gross negligence." What is reasonable, varies

¹ *Cass v. Boston & L. R. Co.*, 14 Allen, 448. See *Lane v. Boston & A. R. Co.*, 112 Mass. 455.

² *Chenoweth v. Dickinson*, 8 B. Mon. 156.

³ *Briggs v. Taylor*, 28 Vt. 180; *Duff v. Budd*, 3 Brod. & B. 177; *Riley v. Horne*, 5 Bing. 217; *Batson v. Donovan*, 4 Barn. & Ald. 432.

in the case of a gratuitous bailee, and that of a bailee for hire. From the former are reasonably expected such care and diligence as persons ordinarily use (that is, careful persons) in their own affairs, and such skill as he has. From the latter are reasonably expected care and diligence such as are exercised in the ordinary and proper course of similar business, and such skill as he ought to have; namely, the skill usual and requisite in the business for which he receives payment.¹

Thus far of a bailment for custody (*locatio custodiæ*), or for hire (*locatio rei*), or the like. Where the bailment requires the performance of services upon chattels (*locatio operis*), the rule with regard to diligence is similar. The bailee is bound to exercise ordinary diligence; to wit, the diligence of a prudent man of the same occupation, and under the same circumstances. He is also bound to exercise a fair average degree of skill in relation to the business which he undertakes; to do his work in a workmanlike manner; and to be possessed of sufficient skill to execute it. He is therefore liable if he either make an engagement without sufficient skill to execute it, or if, possessing the adequate skill, he do not exercise it. For example: The defendant hires a horse of the plaintiff which becomes slightly sick. The defendant, not being a farrier, thereupon prescribes improperly for the horse, and the medicine kills it. This is a breach of duty to the plaintiff, a farrier being near at hand at the time.² Again: The defendant, a builder of houses, undertakes for the plaintiff to rebuild a good and substantial front to his house, but he builds the same so out of perpendicular that it must be taken down. The defendant is liable in an action for negligence.³

¹ *Beal v. South Devon Ry. Co.*, 3 Hurl. & C. 337, Exch. Ch., Crompton, J., speaking for the court. See, also, language to the same effect by Redfield, C. J., in *Briggs v. Taylor*, 28 Vt. 180.

² *Dean v. Keate*, 3 Campb. 4.

³ *Farnsworth v. Garrard*, 1 Campb. 38.

The degree of skill and diligence which is required rises in proportion to the value, the delicacy, and the difficulty of the operation. A workman employed to repair a very delicate mathematical instrument is expected to exert more care and skill than would be required about an ordinary undertaking.¹ The criterion of liability, however, still remains the same: if all things are done by the workman which a diligent and skilful workman in the same situation and business would do, he will be exonerated from liability though the instrument be fractured.²

It should be observed, however, with regard to cases requiring the exercise of skill, that a bailee is not to be required to possess extraordinary skill, such as is possessed by but few persons only in the particular business, but only a fair average, or ordinary, degree of skill; unless, indeed, he engage to possess extraordinary ability. In the absence of agreement or false representations, reasonable skill constitutes the measure of the engagement of the workman in regard to the thing undertaken.³

On the other hand, the bailee employed to do a work (probably) is not liable for failing to possess the requisite skill for the work, if he has not held himself out as possessing such skill. It is the bailor's fault if he intrust a work requiring the exercise of skill to one whom he knows to be without that skill. For example: The defendant, a matter, is employed by the plaintiff, with notice, to cmbroider a fine carpet, and the defendant spoils the materials put into his hands by the plaintiff for the purpose. This is no breach of duty, the defendant not having represented himself as competent for such work.⁴

It is further to be observed that if the loss or ill execution be not properly attributable to the fault or unskilfulness of the workman, or of his servants, but arise from an

¹ Story, Bailments, § 432.

³ *Ib.* § 433.

² *Ib.*

⁴ *Ib.* § 435.

inherent defect in the thing upon which the work is done, the bailor, having furnished the materials, cannot treat the bailee as guilty of negligence.¹ But if the materials were furnished by the bailee, and the result were a failure to perform the contract altogether, or a failure to perform it within the time agreed upon, the bailee would be liable; unless perhaps the materials required by the bailor were such as he (the bailee) was not familiar with, and he had exercised such skill as he possessed in the management of them, the risk being taken by the bailor.²

§ 4. OF PROFESSIONAL SERVICES.

The only difference between the case presented in the present section and that in the last half of the preceding is that there is now no bailment of goods to be wrought upon. The rules of law with regard to the duty of the person employed are not materially different from those above presented. To render a professional man liable for negligence, it is not enough that there has been a less degree of skill than some other professional men might have shown. Extraordinary skill is not required unless professed or contracted for: a fair average degree of skill is all that can be insisted on. Or, as it has been laid down, a person who enters a learned profession undertakes to bring to the exercise of his business simply a reasonable degree of skill and care. He does not undertake, if an attorney, that he will gain a cause at all events; or, if a physician, that he will effect a cure.³

For special illustration of the application of this doctrine, the nature of the liability of attorneys and of medical men for negligence may be taken.

¹ *Ib.* § 428 a.

² In the latter case, the bailor might himself be liable to the bailee.

³ *Lamphier v. Phipos*, 8 Car. & P. 475, Tindal, C. J.; *Hart v. Frame*, 6 Clark & F. 193, 210.

Every client has a right to require the exercise, on the part of his attorney, of care and diligence in the performance of the business intrusted to him, and to a fair average degree of professional skill and knowledge ; and if an attorney have not as much of these qualities as he ought to possess, or if, having them, he neglect to employ them without valid excuse, the law makes him liable for any loss which may have been sustained thereby by his client.¹

Hence an attorney possessed of a reasonable amount of information and skill, according to the duties which he undertakes to perform, and exercising what he possesses with reasonable care and diligence in the affairs of his client, is not liable for errors in judgment, whether in matters of law or of discretion, unless he profess to have the highest order of skill.

It is clear, however, that, when an injury has been sustained which could not have happened except from the want of reasonable skill and diligence on the part of the attorney, the law holds him liable. To take proceedings upon a wrong statute, when there is no question of doubtful construction involved, would be evidence of negligence under this rule. For example : The defendant, an attorney, is employed to take statutory proceedings on behalf of the plaintiffs against their apprentices for misconduct. The defendant proceeds upon a section of the statute relating to servants and not to apprentices. This is deemed such a want of skill or diligence as to render the attorney liable to repay to the plaintiffs the damages and costs incurred by his mistake.²

If an attorney have doubt as to the legal effect of an instrument in which his client is concerned, and submit the question to counsel for advice on which to act, he must lay the facts correctly before the counsel. If, instead of

¹ Saunders, Negligence, 155.

² Hart v. Frame, 6 Clark & F. 193.

laying the case and facts fully before the counsel, he attempt to state inferences from the facts, he acts at his peril. The counsel should be permitted to draw his own inferences. For example: The defendant, a lawyer, employed by the plaintiff, seeking counsel of another lawyer, misstates the legal effect of certain deeds not accompanying the case, whereby he (the defendant) receives and acts upon incorrect advice, to the damage of his client. This is evidence of negligence for which he is liable.¹

In the like exercise of due care and skill, an attorney employed to investigate the title to an estate, or to seek out an eligible investment and obtain security for money advanced, must examine the title to and extent of the security offered; and even then if the title prove obviously defective, or the security prove evidently bad or insufficient, he will be liable.²

The authorities finally appear to establish the rule that an attorney is liable for the consequences of ignorance or non-observance of the rules of practice of court, for the want of care in the preparation of a cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of the cause as is usually allotted to his department of the profession. On the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually submitted to one in the highest walks of the legal profession.³

To render a medical man liable for negligence, there must likewise appear to have been a failure to exercise such diligence or skill as a prudent medical man of fair ability would have exercised under the same circumstances.

¹ *Ireson v. Pearman*, 3 Barn. & C. 799.

² *Knight v. Quarles*, 4 Moore, 532; *Whitehead v. Greetham*, 10 Moore, 183; *Donaldson v. Haldane*, 7 Clark & F. 762.

³ *Godefroy v. Dalton*, 6 Bing. 460.

The degree of diligence required will be proportionate to the nature of the case ; and, in some cases, nothing short of the highest degree of diligence can be excusable. As to the *skill* to be exercised, however, nothing more than a fair and reasonable degree can be insisted upon : the law does not require the exercise of the highest order of medical ability, unless the party has held himself out as possessed of it. For example : The defendant, a physician, is retained as accoucheur to attend the plaintiff's wife, and the plaintiff charges that he failed to use due and proper care and skill in the treatment of the lady, whereby she was injured. The judge instructs the jury that it is not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of skill, nor that even he might possibly have used some greater degree of care. The question to be decided is, whether there has been a want of competent care and skill to such an extent as to lead to the bad result.¹ Again : The defendant, a surgeon, is employed by the plaintiff to treat an injury done to his hand and wrist ; and the plaintiff charges that he conducted himself in the business in such a careless, negligent, and unskilful manner, that the plaintiff's hand became withered, and was likely to become useless. The judge instructs the jury that the question for them to decide is, whether they are satisfied that the injury sustained is attributable to the want of a reasonable and proper degree of care and skill in the defendant's treatment. The defendant's business did not require him to undertake to perform a cure, nor to use the highest possible degree of skill.² Again : The defendant, a surgeon, is employed by the plaintiff to treat a violent fracture of the latter's arm, and is charged with malprac-

¹ Rich v. Pierpont, 3 Fost. & F. 35.

² Lamphier v. Phipps, 8 Car. & P. 475. These two cases, though *at nisi prius*, are often referred to as authority.

tice, resulting in serious and permanent injury to the plaintiff. The judge instructs the jury that a surgeon contracts with those who employ him that he has such skill and knowledge as will enable him properly and judiciously to perform the duties of his calling. The law does not, however, require the highest degree of skill and knowledge, but only such a reasonable degree as will enable the person safely and discreetly to discharge the duties assumed. The instruction is deemed correct.¹

If the patient, by refusing to adopt the remedies of the physician, frustrate the latter's endeavors, or if he aggravate the case by his own misconduct, he, of course, cannot hold the physician liable for the consequences attributable to such action. Still if, after such misconduct, the physician continue to treat the patient, he will be liable for any injury sustained by reason of his own negligence in such subsequent treatment.²

It should further be observed, with regard (probably) to all cases of the performance of services, that, for an injury occasioned by the want of common care or skill in doing what has been undertaken, an action may be maintained in favor of the party relying upon the undertaking and injured by the breach of it, though there was no consideration therefor.³

§ 5. OF TELEGRAPH COMPANIES.

Telegraph companies are bound to exercise reasonable diligence and care in the transmission of messages, and are liable to the senders for any failure to conform to the

¹ Wood v. Clapp, 4 Sneed, 65.

² Hibbard v. Thompson, 109 Mass. 288; Wharton, Negligence, § 737.

³ Gill v. Middleton, 105 Mass. 479. See, however, Ritchey v. West, 23 Ill. 385, holding that a physician is liable only for gross negligence if the service be gratuitous. *Sed quære.*

requirements of this duty. They are not insurers of the correct transmission of despatches.¹

They are, however, bound to deliver the precise message given them for transmission (when it is legibly written), and for a failure to do so they are liable, in the absence, at least, of a rule requiring the message to be repeated by the receiver, and this, too, even in the face of a notice to the contrary; unless the error was caused by the condition of the atmosphere, or by some other obstacle, without fault on the part of the telegraph company. For example: The defendants receive a message from the plaintiffs for transmission at night, ordering a cargo of corn at a price named by the owner. The message is written upon a blank of the defendants, at the top of which is a declaration that the defendants are not to be liable for mistakes, or delays, or non-delivery beyond the sum paid for the message. The message is sent; but, by reason of negligence, it is not correctly delivered, and the plaintiffs fail to obtain the corn at the price named, the grain having directly advanced in price. The defendants are liable, the notice being unreasonable.²

9
1 A condition that the telegraph company shall not be liable to the sender of a despatch for a mistake in it, unless the message shall be repeated by the receiver, is, however, reasonable and valid, though referred to as among the conditions on the back of the blank used by the sender, and though it be not read.³ And the same is true of a condition that the telegraph company shall not be liable

¹ *Western Union Tel. Co. v. Carew*, 15 Mich. 525, 533; *Breese v. United States Tel. Co.*, 48 N. Y. 132; *Playford v. United Kingdom Tel. Co.*, Law R. 4 Q. B. 706, 710.

² See *True v. International Tel. Co.*, 60 Maine, 9. The message was not delivered at all in this case.

³ *Breese v. United States Tel. Co.*, 48 N. Y. 132; *Wolf v. Western Union Tel. Co.*, 62 Penn. St. 83; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Western Union Tel. Co. v. Carew*, 15 Mich. 525.

for mistakes occurring on other lines, in the course of transmitting a message, though the first company receive pay for the entire transmission.¹ But it is held that a condition that the company shall not be liable for mistakes or delays in transmitting despatches applies merely to the transmission, and not to delays in delivering them.²

It is proper, in this connection, to observe that, by the American law, the telegraph company is also liable to the person to whom the message is transmitted, upon delivery thereof, in case of an error in transmission attributable to the fault of the company, when the error is attended with damage to the person receiving it;³ though the rule is otherwise in England.⁴ But the telegraph company is (probably) under no liability to the person to whom a message is addressed for a failure, however negligent, to deliver.

§ 6. OF THE LIABILITY OF AGENTS, SERVANTS, TRUSTEES, OFFICERS, AND THE LIKE TO THEIR SUPERIORS.

The test of the liability of an agent to his principal for damage done by reason of alleged negligence is the conduct of a prudent or careful or skilful agent in the like situation. If the agent's action conform to this standard, he will be exempt from liability; otherwise not.

¹ *Western Union Tel. Co. v. Carew*, *supra*.

² *Bryant v. American Tel. Co.*, 1 Daly, 575.

³ *New York & W. Tel. Co. v. Dryburg*, 35 Penn. St. 298; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; *Ellis v. American Tel. Co.*, 13 Allen, 226. The ground of liability is variously stated. See *Bigelow's L. C. Torts*, 621, *et seq.* A valid ground appears to be, that the defendants are to be treated as having made to the plaintiff a false representation of their authority from the sender to deliver the message. *May v. Western Union Tel. Co.*, 112 Mass. 90; *ante*, p. 20.

⁴ *Playford v. United Kingdom Tel. Co.*, Law R. 4 Q. B. 706. The English courts hold that the only duty owed by the telegraph company is to the sender of the message.

In accordance with this principle, it is held not necessary, in order to fix the liability of a factor to his principal for damage, to prove that the factor has been guilty of fraud or of such gross negligence as would carry with it a presumption of fraud. The factor is required to act with reasonable care and prudence in his employment, exercising his judgment after proper inquiry and precautions. If the exercise of ordinary diligence on his part would have prevented the loss, he will be liable; otherwise not. For example: The defendants, factors, are directed by the plaintiff, their principal, to remit in bills the amount of funds in their hands. They do so in the bills of persons who at the time are in good credit in the place in which the factors reside, though not in the place of residence of the plaintiff. If they have not notice of the latter fact, the defendants are not liable; due diligence not requiring them to make inquiry of the credit of the parties to the bills of the place of residence of the principal, when they are of good credit at the place of residence of the factors.¹ Again: The defendants, factors, are requested to remit to the plaintiff, their principal, in bills. They remit in the bills of R. and B., partners, the former residing at the place of residence of the defendants, the latter at the place of residence of the plaintiff, to the latter's knowledge. R. and B. have houses of business at both places. R. (the non-resident party) is in good credit at the defendant's place of residence, but B. (the resident party) is not. The defendants are liable whether they knew B.'s standing or not; being bound to make inquiry as to him.²

In accordance with the same principle, an agent acting in good faith is not to be held liable if in time of danger and difficulty he make the best disposition in his power for the preservation of money in his charge, though it involve the exchange of funds of a less portable for those of a more

¹ *Leverick v. Meigs*, 1 Cowen, 645.

² *Ib.*

portable kind. For example : The defendant, as agent for the sale of lands for the plaintiff, becomes possessed of money of the plaintiff in time of war and in proximity to the scene of conflict ; the defendant residing on one side of the line of conflict and the plaintiff on the other. The money cannot be safely transmitted to the plaintiff, or safely deposited in any bank, and the defendant, having a considerable amount thereof in small bank-notes, exchanges the same for larger notes of the currency generally in use where he is, so as to reduce the bulk of the funds to be carried about his person, and to enable him to keep them the more securely. The currency for which the small notes were taken becomes worthless in the defendant's hands. He is not liable for the loss, having exercised due diligence in the matter.¹

Extraordinary emergencies may arise in which a person who is an agent may, from the very necessities of the case, be justified in assuming extraordinary powers ; and his acts fairly done under such circumstances will be deemed lawful.² On the other hand, it seems clear that the presence of such emergencies may not only justify, but, in the light of prudence, even demand the resort to extraordinary measures. Ordinarily it is proper and (probably) necessary for an agent to deposit the funds of his principal in bank ;³ but if a hostile army were approaching the place at the time, to the knowledge of the agent, prudence would require him to make some other and unusual disposition of the funds.⁴

The duty of an agent employed to procure insurance is to take care that the policy is executed so as to cover the contemplated risk ; and to this end he is, of course, bound to possess and use reasonable skill. The agent is also to

¹ Wood v. Cooper, 2 Heisk. 441.

² Story, Agency, § 141.

³ Heckert's Appeal, 69 Penn. St. 264.

⁴ See Wood v. Cooper, *supra*.

take care that the underwriters are in good credit; though it is enough that they are at the time in good repute.¹

What is the proper exercise of due diligence and skill in such cases is sometimes a matter of great nicety. On the one hand, an agent who acts *bona fide* in effecting insurance for his principal, using reasonable skill and diligence, is not liable to be called to account, though the insurance might possibly have been procured from other underwriters on better terms, or so as to include additional risks, by which the principal might, in the event of loss by those risks, have been indemnified.² On the other hand, an agent in the like case is bound to have inserted in the policy all the ordinary risks commonly covered; and if he omit to have them inserted when a reasonable attention to his business and the objects of the insurance would have induced other agents, of reasonable skill and diligence, to have them inserted, he will be liable for negligence in case of loss.³ And the same will be true if he negligently or wilfully conceal a material fact or make a material misrepresentation whereby the policy is afterwards avoided.⁴

In any case, if it should appear that, even if the duty expected had been performed with proper care, the principal could have derived no benefit therefrom either because the result would have been contrary to express law or to public policy or to good morals, the negligence of the agent or other party acting in the matter is not a breach of duty.⁵

Servants also are bound to take due care of their masters' interests, so far as intrusted to them. If a servant be guilty of a failure to exercise such care or skill or prudence

¹ Story, Agency, § 187.

² *Ib.* § 191; *Moore v. Morgue*, Cowp. 479.

³ Story, Agency, § 191; *Park v. Hammond*, 6 Taunt. 495.

⁴ *Mayhew v. Forrester*, 5 Taunt. 615.

⁵ Story, Agency, § 238.

as a diligent servant would exercise under the circumstances, and the master suffer damage thereby, the servant will be liable for a breach of duty. On the other hand, the servant is not bound to prevent loss to his master at all hazards: he is only required to use the care or skill of a diligent servant. For example: The defendant, a servant, loses by theft of another the goods of the plaintiff, his master and a carrier; but there is no proof of negligence on the part of the defendant. The plaintiff must bear the loss.¹ Again: The defendant, treasurer of the plaintiffs, is charged with a failure to pay over to the plaintiffs specific money in his possession. He pleads that after receiving the money, and before the time when he ought to have paid it or could have paid it to the plaintiffs, he was robbed by violence of the whole amount without any default or want of due care on his part. The plea shows that the defendant has not violated his duty to the plaintiffs.²

If, too, it should appear that the principal or master, upon a full knowledge of the circumstances, has deliberately ratified the acts or omissions complained of, he will then be compelled to overlook the breach of duty, and cannot recall his condonation of the offence.³

A trustee is not liable for a loss which has occurred, if he exercised common skill, prudence, and caution.⁴ In considering whether a trustee has made himself liable for a loss, such as one arising by reason of a failure to collect and convert into money the trust assets, regard must be had to the nature of the trust. A guardian is not in ordinary cases held to such prompt action in enforcing the collection of securities as an executor, administrator, or assignee acting for the benefit of creditors. The duty of

¹ *Savage v. Walthew*, 11 Mod. 135, *coram* Lord Holt.

² *Walker v. Guarantee Assoc.*, 18 Q. B. 277.

³ Story, Agency, § 239.

⁴ *Twaddle's Appeal*, 5 Barr, 15; *Miller v. Proctor*, 20 Ohio St. 442.

the former is to hold and retain; of the latter, to collect and prepare for distribution.¹

An administrator or executor or assignee of an insolvent should within a reasonable time make proper efforts to convert all the assets and securities of the estate into money for distribution. Failing to make such effort, the party is liable for any loss to the estate thereby sustained. For example: The defendant, an administrator, upon a sale of assets, takes a note with security, payable in six months, which when it falls due is good and collectible; but the defendant makes no effort to collect it within six months after its maturity, when it is too late, the maker having become insolvent. The defendant is guilty of a breach of duty, and is liable for the loss.²

Executors directed by will to put money at interest for a specified length of time by deposit in bank or loan upon mortgage have a discretion to loan it for less periods than the whole time named, and to reloan it from time to time, and change the mortgage securities as they may deem best for the parties interested. And though, in so acting, the executors are at fault in taking insufficient security for a loan, still if they afterwards procure the borrower to substitute therefor other securities deemed by them sufficient, and such as they would have been justified in taking upon the original loan, they will not be deemed to have committed a breach of duty so as to be accountable for a loss happening through unforeseen defects in the latter security, merely because of their default in the first instance. If they have exercised due care in the second instance, they are not liable for the loss.³

¹ Chambersburg Sav. Assoc. Appeal, 76 Penn. St. 203; Charlton's Appeal, 34 Penn. St. 473.

² Johnson's Estate, 9 Watts & S. 107; Chambersburg Sav. Assoc. Appeal, *supra*.

³ Miller v. Proctor, 22 Ohio St. 442.

If the business of the trustee be such as to involve questions of law, or such as to suggest the aid of legal counsel, due care and diligence will require him to obtain legal advice. But having done so, and having no reason to suppose that the advice given is incompetent, the trustee will be exonerated in acting thereon. For example: The defendants, executors of an estate, under directions to invest the moneys of the estate on loan well secured, apply to a lawyer of good standing in another town concerning the security of a mill in that place, offered by a person desiring to borrow money of the defendants, and are told that the security is good; and a mortgage of the borrower's interest therein is accordingly taken. The mill, however, is owned by the borrower and another in partnership, and is liable for the firm debts. The owners become insolvent, and the note of a third person, well secured, is offered the defendants on condition of a release of the mortgage. By advice of the same lawyer, the offer is declined, and the mill security is lost. The defendants are not liable, having acted with the prudence of men of ordinary diligence, care, and prudence in the matter.¹

It is settled law in England and in several of the American States, that due diligence on the part of a trustee, under directions to invest trust money, requires him to invest the fund in real estate or government securities, or to obtain authority of court to use the money otherwise.²

Directors of corporations are bound to exercise the ordinary diligence of persons in the same situation. They are not expected to devote their whole time and attention to the corporation over whose interests they have charge, and are not guilty of negligence in failing to give constant superintendence to the business. Other officers, to whom

¹ *Miller v. Proctor, supra.*

² *Hemphill's Estate, 18 Penn. St. 303.*

compensation is paid for their whole time in the affairs of the corporation, have the immediate management.¹

In relation to those officers, the duties of directors are those of control; and the neglect which would render them liable for not exercising that control properly must depend upon circumstances. They are simply to exercise common diligence over such officers. If nothing, in the exercise of such diligence, has come to their knowledge to awaken suspicion concerning the conduct of the managing officers, the directors are not guilty of negligence, and hence are not liable for losses sustained by reason of the misconduct of such officers.² Those officers are the agents or servants of the corporation, and not of the directors.

If, however, the directors become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required; and a failure to exercise such care, resulting in damage to the corporation or to its customers, renders the directors personally liable.³ And the same rule (probably) applies to all trustees or general officers having the oversight of subordinate officers. But for negligence or misconduct, resulting in injury to the corporation, directors are not liable at law to individual stockholders as stockholders:⁴ the remedy is in equity, and to be pursued when practicable by the corporation.⁵

With regard to public officers, the fact that they may have contracted with the municipal or State government, and not with individuals, to perform their duties faithfully, does not imply that they do not also owe special duties to

¹ *Percy v. Millaudon*, 20 Mart. (La.) 68.

² *Ib.*

³ *Brewer v. Boston Theatre*, 104 Mass. 378.

⁴ *Ib.*; *Godbold v. Branch Bank*, 11 Ala. 191; *United Soc. v. Underwood*, 9 Bush, 609.

⁵ *Brewer v. Boston Theatre*, *supra*. It is only from necessity, and to prevent a failure of justice, that individual stockholders can proceed against the directors, even in equity. *Ib.*

individuals in the performance of their business.¹ Such officers are bound to exercise such diligence as the nature of their position reasonably demands; and for a failure, resulting in special damage to any individual, they are liable to him.² For example: The defendant, a public inspector of meat, undertakes, in accordance with his official duty, to cut, weigh, pack, salt, and cooper, for export, a quantity of beef belonging to the plaintiff, and does the same so negligently that the meat becomes spoiled and worthless. This is a breach of duty to the plaintiff, and the defendant is liable to him in damages.³

Officers and agents of the general government, such as postmasters and managers of public works, are not liable for the negligence or other misconduct of their subordinates, unless the latter are the servants of the former and accountable to them alone. Government officers are, however, liable for the consequences of their own negligence;⁴ and this covers cases of negligence with respect to the conduct of such of their subordinates as are under their supervision and guidance.⁵ For example: The defendant, a postmaster, appoints with notice an incompetent person as a clerk to the government in his post-office; and, by reason of the negligence or incompetence of such person, a letter containing \$100 belonging to the plaintiff, is lost. The defendant is liable.⁶

An individual cannot, however, for his own benefit, in his own name, maintain a suit against another for negli-

¹ *Henley v. Lyme Regis*, 5 Bing. 91; s. c. 1 Bing. N. C. 222; *Farrant v. Barnes*, 11 Com. B. n. s. 553.

² See *Story, Agency*, §§ 320, 321; *Hayes v. Porter*, 22 Maine, 371.

³ *Hayes v. Porter*, *supra*. See, also, the example of the postmaster in the next paragraph.

⁴ *Clothier v. Webster*, 12 Com. B. n. s. 790; *Mersey Docks v. Gibbs*, Law R. 1 H. L. 98.

⁵ *Story, Bailment*, § 463; *Schroyer v. Lynch*, 8 Watts, 453; *Wiggins v. Hathaway*, 6 Barb. 632.

⁶ See *Wiggins v. Hathaway*, *supra*.

gence in the discharge of a public duty where the damage is solely to the public.¹ The reason commonly given for this is, that great inconvenience would follow if a person violating a trust of this kind could be sued by each person in the community. A better reason, however, is, that as the right infringed belongs to the sovereign, as representing the public at large, so the correlative duty is one for the breach of which the sovereign alone can sue.

Officers of the courts are liable for the injurious consequences of such official acts of their own or of their servants as are attributable to the want of the care of prudent men in the same situation.² For example: The defendant levies upon a quantity of coal on board a vessel. The coal is left on the vessel, with the master's consent, in charge of a keeper of the defendant, and while so held the vessel is sunk during a gale, with the coal on board, to the damage of the plaintiff, for whom the levy is made. The defendant is liable if he has failed to take such steps for the safety of the coal as a careful, prudent man, well acquainted with the condition of the vessel and its location with regard to exposure to storms, might reasonably be expected to take if the coal belonged to himself.³

Judges, however, while acting in a judicial capacity, within their jurisdiction, are not liable for negligence.⁴ And the same is true even of a person acting in a situation which makes him virtually a private arbitrator.⁵ Hav-

¹ 1 Black. Com. 220.

² Wharton, Negligence, § 286; *Ashby v. White*, *Ld. Raym.* 938.

³ *Wolfe v. Door*, 24 Maine, 104; *Dunlop v. Knapp*, 14 Ohio St. 64; *Kennard v. Willmore*, 2 Heisk. 619; *Browning v. Hanford*, 5 Hill, 588; *Moore v. Westervelt*, 27 N. Y. 234.

⁴ *Moore v. Westervelt*, *supra*.

⁵ See *Yates v. Lansing*, 5 Johns. 282; *Pratt v. Gardiner*, 2 Cush. 63; *Bradley v. Fisher*, 13 Wall. 350.

⁶ *Pappa v. Rose*, *Law R.* 7 C. P. 32, 525; *Tharsis Sulphur Co. v. Loftus*, *Law R.* 8 C. P. 1.

ing submitted a dispute to the decision of an arbitrator, neither party can require him to exercise the skill or care of an expert, unless he has held himself out to possess it, or has agreed to exercise it. For example: The defendant, as broker, makes a contract for the plaintiff, as follows: "Sold by order and for account of P., to my principal S., to arrive, 500 tons Black Smyrna raisins — 1869 growth — fair average quality in opinion of selling broker, to be delivered here in London — at 22s. per cwt.," &c. This contract makes the defendant virtually an arbitrator, to determine between the parties any difference arising between them as to the quality of the raisins tendered in fulfilment of the contract, not stipulating for care or skill on the part of the defendant; and he is not liable for failing to exercise reasonable care and skill in coming to a decision, if he act in good faith, to the best of his judgment.¹

Dealings between agents and their principals (including attorney and client) and between trustees and their *cestuis que trust*, and between persons in like situations, with reference to the interests confided, by which the agent or trustee is to acquire a right, or a new right, therein, are, for the welfare of the principal or *cestui que trust*, discouraged by the law. Such transactions are *prima facie* voidable by the latter parties; and they are binding only upon clear proof of the utmost good faith on the part of the agent or trustee, and a full disclosure of every thing necessary to enable the principal or *cestui que trust* to act with perfect understanding of the nature and value of his rights. If the agent or trustee should fail to give such information and to make every needed disclosure, he has violated his duty to his principal or *cestui que trust*; which fact will entitle the injured party to redress, even though the omission was not intentional. To neglect to give it is to neglect to do that which a prudent, diligent, and honest agent or trustee would do in the same

¹ Pappa v. Rose, *supra*.

situation; and the redress may be sought by a rescission of the transaction, or (probably) by an action for damages, allowing the transaction to stand.¹

The wrong may, however, be subsequently ratified by the injured party, acting upon a full knowledge of the facts, and uninfluenced by the wrong-doer.² But it appears to be necessary to constitute a binding ratification that a trustee or client, if not a principal, should not only be aware of all the facts, and act independently, but that he should also be apprised of the law as to how the facts would be dealt with if brought before the courts.³

§ 7. OF THE USE OF PREMISES.

In this section the duty of the owner or occupant of premises to persons who have sustained damage thereon, by reason of the condition of the premises, is to be stated. The question of the existence and nature of this duty turns upon the consideration of the occasion which brought the injured person there;—whether the plaintiff was a trespasser, a bare licensee, an invited licensee, a customer, or a servant. The question must, therefore, be considered with reference to each of these situations.

The owner or occupant of premises owes no duty to keep his premises in repair for the purposes of trespassers. In other words, it is no breach of duty to a trespasser that a man's premises were in a dangerous state of disorder, whatever the consequences to the former. But this rule of law must not be understood as declaring that the occupant or owner owes *no* duty to trespassers with regard to the management of his premises. He has no right even as to such

¹ Upon the subject of this paragraph, see Chapter 5 of the author's work on Fraud, and especially §§ 2, 3, and 5 of that chapter.

² *Salmon v. Cutts*, 4 De G. & S. 125.

³ *Cumberland Coal Co. v. Sherman*, 20 Md. 134.

persons to bring dangerous animals or engines upon his land unless he properly secure them. For example: The defendant has a vicious or savage dog upon his premises which he heedlessly allows in the day-time to run at large unmuzzled, having notice of his propensities. The plaintiff, having strayed upon the premises without permission, while hunting, is attacked and bitten by the dog. The defendant has violated his duty to the plaintiff in not securing the dog, and is liable.¹ Again: The defendant sets a spring-gun in his grounds to catch persons entering thereon without permission, and fails to give notice of the particular danger. The plaintiff while trespassing on the premises is injured by the gun, having no notice of danger. The defendant is liable.²

If, however, the trespasser had actual or constructive notice of the presence of the dangerous thing,³ or (probably) if he entered in the night-time or in the day-time with a felonious intent, he would not be entitled to recover.⁴ In case of an entry in the night-time, it might not always be necessary that the party had entered with a felonious intent. If it were proper or customary to keep a savage dog as a watch, it might be considered that a person entering by night without permission acted with notice.

A bare licensee is one who enters another's premises without right or actual grant of permission, but still under circumstances from which he has come to suppose a permission; as in the case of one who crosses an open field on a foot-path, commonly used by the neighbors, but

¹ *Loomis v. Terry*, 17 Wend. 496. If the plaintiff were not a trespasser, the defendant would clearly be liable, though not guilty of negligence in the care of the animal; supposing the plaintiff not to have provoked it. *May v. Burdett*, 9 Q. B. 101; *Woolf v. Chalker*, 31 Conn. 121; *ante*, pp. 248-250.

² *Bird v. Holbrook*, 4 Bing. 628.

³ *Hlott v. Wilks*, 3 Barn. & Ald. 308.

⁴ See *Loomis v. Terry*, *supra*.

without any right of way. Such a person, though not in a position to require the owner or occupant of the land to keep the same in repair,¹ occupies (probably) a more favorable position than a trespasser. He can, of course, insist that the occupant shall let loose no savage beast upon him, and set no traps in his way, without giving him fair notice. But, further, it should seem that, if it were usual for people to pass over the occupant's premises in the night-time, he could require the occupant to exercise reasonable care with respect to the keeping of vicious animals, of whose propensity to do harm the occupant has notice.

Indeed, by the law of England, a bare licensee can insist upon the occupant's keeping his premises in a safe condition in one particular. A man has no right to render the highway dangerous or less useful to the public than it ordinarily is: if he *should* do so, he is liable as for a nuisance to any one who has suffered damage thereby.² And a bare licensee on the wrong-doer's premises will be entitled to recover for any damage sustained thereby. For example: The defendant digs a pit adjoining the highway, and fails to fence it off from the street. The plaintiff, while walking along the street, in the dark, accidentally steps a little aside in front of the pit, and falls into it, thereby sustaining bodily injury: The defendant's act in leaving the place unguarded makes it a public nuisance, and he is liable for the injury received by the plaintiff.³

If, however, the pit, though near, were not substantially adjoining the highway, so that the plaintiff must have

¹ *Sweeny v. Old Colony R. Co.*, 10 Allen, 368; s. c. *Bigelow's L. C. Torts*, 660.

² *Ante*, p. 237.

³ *Barnes v. Ward*, 9 Com. B. 392. But see *contra*, *Howland v. Vincent*, 10 Met. 371, in which, however, the point appears to have been overlooked that the defendant's act amounted to a public nuisance.

been a trespasser before reaching it, he could not treat the omission of the defendant to fence as a breach of duty. For example: The defendants, being possessed of land near to an ancient common and public footway, construct a reservoir for receiving the back-wash of water at the lock of a canal owned by them. The plaintiff's intestate sets out by night along this footpath for Sheffield. The path runs alongside of the canal for about three hundred yards to a point at which it is bounded on one side by a lock, and on the other by the reservoir. At this point, the pathway turns to the right over a bridge, crossing the by-wash. A person continuing straight on in the direction of the pathway, and not turning to the right to go over the bridge would find himself (if not prevented by the arm of a lock) upon a grassy plat about five yards long by seven broad, between the lock and the by-wash, level with, but somewhat distant from, the footpath; the plat being unfenced, and having a fall of about three yards to the water. On the morning following the setting out of the deceased, he is found drowned at this point. The defendants are not guilty of a breach of duty in not fencing the place, since it is not substantially adjoining the highway, and the deceased must have become a trespasser before reaching the reservoir.¹

The same will be true of injury sustained by straying cattle or horses.² For example: The defendant digs a pit in his waste land within thirty-six feet of the highway, and the plaintiff's horse escapes into the waste and falls into the pit and is killed. The defendant has violated no duty to the plaintiff.³

¹ *Hardcastle v. South Yorkshire Ry. Co.*, 4 Hurl. & N. 67; *Dinks v. South Yorkshire Ry. Co.*, 3 Best & S. 244; *Hounsell v. Smyth*, 7 Com. B. n. s. 731.

² *Blyth v. Topham*, Croke Jac. 158; *Knight v. Abert*, 6 Barr, 472

³ *Blyth v. Topham*, *supra*.

And this appears to be true in the case of straying animals, not only where the owner is not liable for their act of feeding on the defendant's premises, but, also, where he is liable, if the pit was not adjoining the highway. For example: The defendant is owner of unfenced woodland, in which it is not unlawful for the plaintiff's cattle to feed. One of the cattle falls into an unfenced pit in the wood, and is injured. The defendant is not liable.¹

If the licensee were invited, either expressly or by active conduct, by the occupant, the situation becomes entirely changed. In such a case, the occupant owes a duty to the invited licensee, not merely to restrain his ferocious animals, and to prevent injury from dangerous concealed engines, and to guard against nuisances adjoining the highway, but also to keep his premises in reasonable repair, and to refrain from negligence generally; otherwise, he will be liable for any injury sustained by the licensee, not caused by the latter's own act. In other words, the owner or occupant² is bound to exercise reasonable care to prevent damage from unusual danger, of which he has, or ought to have, knowledge. For example: The defendants, a railroad corporation, have a private crossing on their land over their railroad, at grade, in a city, which crossing they have constructed for the accommodation of the public; and they keep a flagman stationed there to prevent persons from crossing when there is danger. The plaintiff coming down the way to the cross-

¹ *Knight v. Abert, supra*. The defendant would have been liable if the plaintiff had *hired* the pasture of his cattle in the wood.

² A lessor of premises is liable for their condition if their unsafe condition was due to his negligence; if due to the negligence of the tenant, the latter is liable, unless the lessor has expressly assumed the duty to keep in repair, or unless he is in possession with his tenant. See *Fisher v. Thirkell*, 21 Mich. 1; s. c. *Bigelow's L. C. Torts*, 627; *Elliott v. Pray*, 10 Allen, 378.

ing with horse and wagon is signalled by the flagman to cross, and on proceeding, according to the signal, to cross the track, is run against by one of the defendants' engines; the flagman having been guilty of carelessness in giving the signal. This is a breach of duty, and the defendants are liable for the damage sustained.¹ Again: The defendant, owner of land, having a private road for the use of persons coming to his house, gives permission to a builder engaged in erecting a house on the land, to place materials on the road. The plaintiff, having occasion to use the road in the night, for the purpose of going to the defendant's residence, runs against the materials and sustains damage, without fault of his own. The defendant is liable; having held out an inducement to the plaintiff to go to the place in question.²

The gist of the liability in such cases consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe, that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared, or allowed to be so used.³ The real distinction, therefore, is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others, involves no liability for negligence; but, if he, directly or by implication, induce persons to enter upon his premises, he thereby assumes an obligation to keep them in a safe condition,

¹ *Sweeny v. Old Colony R. Co.*, 10 Allen, 368; s. c. *Bigelow's L. C. Torts*, 660.

² *Corby v. Hill*, 4 Com. B. n. s. 556.

³ *Sweeny v. Old Colony R. Co.*, *supra*, *Bigelow, C. J.*

suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.¹

It was urged in the authority in which this doctrine was laid down (a point worthy of notice here) that, if the defendants were liable in such a case, they would be made to suffer by reason of the fact that they had taken precautions to guard against accident at a place which they were not bound to keep open for use at all, and that the case would thus present the (supposed) singular aspect of a party liable for neglect in the performance of a duty voluntarily assumed, and not imposed by law. The answer was, that this was no anomaly. If a person, it was observed, undertake to do an act, or to discharge a duty, by which the conduct of others may properly be regulated, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be properly performed shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend upon the motives or considerations which induced a party to take on himself a particular duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.²

In case the injury arise by reason of a defective condition of the occupant's premises, it is necessary to the liability of the party to a licensee that he had notice of the defect before the damage was sustained.³ For example: The defendant is proprietor of a hotel, containing in one of the passage-ways a glass door, the glass in which has gradually become loosened and insecure; but the defendant is not aware of the fact, nor is he in fault for not know-

¹ *Ib.* See, also, *Balch v. Smith*, 7 Hurl. & N. 741.

² *Sweeny v. Old Colony R. Co.*, Bigelow, C. J.

³ *Welfare v. London & B. Ry. Co.*, Law R. 4 Q. B. 693; *Southcote v. Stanley*, 1 Hurl. & N. 247.

ing it. The glass falls out as the plaintiff opens the door, and the plaintiff, a visitor merely, is injured. The defendant is not liable.¹

The case of a person entering upon the premises of another as a customer, on purposes of business, is (probably) still stronger against the occupant. It should seem that a greater degree of care ought to be taken to protect such a person than one to whom (it may be) a mere tacit inducement was held out to enter, since it may be the *duty* of the customer to enter, and not merely his convenience. A master may require his servant to go to a neighboring shop for provisions ; and an officer may be required to enter upon premises to make a levy. Authorities, however, are wanting in which any occasion for this distinction has been presented.

It is clear that customers stand upon a more favorable plane than bare licensees, and that the owner or occupant of the premises owes a duty to them to keep the premises in such repair or condition as to enable them to go thereon for the transaction of their business in the usual manner of customers ; and that, if injury happen by reason of the improper state of the premises, of which fact the occupant has notice, he will be liable. Or, as the rule has been stated by judicial authority, the owner or occupant of premises is liable in damages to those who come to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him for an injury occasioned by the unsafe condition of the premises or of the access thereto, which is known by him and not by them, and which he has negligently suffered to exist, and has given them no notice of.² For example : The defendant, proprietor of a brewery, leaves a trap-door in a pas-

¹ *Southcote v. Stanley*, *supra*. Had the plaintiff been a guest, the defendant would (probably) have been liable.

² *Carleton v. Franconia Iron Co.*, 99 Mass. 216, Gray, J.

sage-way within his premises, leading to his office, open and unguarded by night, and the plaintiff's wife, in going through the passage-way by night for purposes of business with the proprietor, falls, without fault of her own, down the hole and is killed. The defendant is liable.¹ Again: The defendant's clerk, in the course of his business, takes the plaintiff into a dark part of their store, and while there she falls through a trap-door, left open and unguarded, and is injured. The defendants are guilty of negligence, and liable for the damage sustained.²

In accordance with the principle stated, the proprietors of a wharf, established for the use of the public, are liable for injury sustained by a vessel by reason of the dangerous condition of the place of landing, known to the proprietors of the wharf and carelessly allowed to remain, and not known to the plaintiff. For example: The defendants, owners of a wharf at tide-water, procure the plaintiff to bring his vessel to it to be there discharged of its cargo, and suffer the vessel to be placed there, at high tide, over a rock sunk and concealed in the adjoining dock. The defendants are aware of the position of the rock and of its danger to vessels; but no notice of its existence is given, and the plaintiff is ignorant of the fact. With the ebb of the tide, the vessel settles down upon the rock and sustains injury. The defendants are guilty of a breach of duty, and are liable for the damage.³

The question of the occupant's liability in cases like this, will be affected by the consideration whether the injured party was fairly authorized under the circumstances to go upon the particular part of the premises at which the accident happened. If the place was one which customers are wont to frequent without objection, it will be assumed that

¹ *Chapman v. Rothwell*, El. B. & E. 168.

² *Freer v. Cameron*, 4 Rich. 228.

³ *Carleton v. Franconia Iron Co.*, *supra*.

the party is authorized to go there. For example: The defendants, owners of a store, situated upon a public street, let the upper stories thereof to another; and an entrance directly in front of the stairs which lead above is so constructed and kept constantly open that it is used for passage for persons going upstairs. There is a trap-door between the entrance and the stairs; and the plaintiff entering the place on business, and in the exercise of due care, falls through the trap, the same being open, and is injured. The defendant is guilty of a breach of duty in leaving the trap-door open, and is liable to the plaintiff.¹

If, however, a customer is injured by reason of the bad condition of a portion of the premises not open to the public, and no invitation or inducement has been held out to him by the owner or occupant to go there, he cannot recover for injury sustained there, though the place be frequented by the servants of the occupant. For example: The defendants are owners of a foundry, on the front door of the outer part of which is placed the sign "No admittance." The plaintiff enters the outer building to inquire after certain castings of his, and the defendant tells him that they are nearly ready, and sends a workman into the foundry part of the building to see about them. The plaintiff follows the workman, though not invited, and though none but persons employed there go into the foundry, falls into a scuttle, and is injured. The defendant is not liable.²

This duty to customers, however, requires the occupant to use due care over all parts of his premises and their appurtenances to which the customer has need of access in the performance of the business. For example: The defendants, owners of a dock, provide a gangway for passage from the plaintiff's vessel; the gangway being in an inse-

¹ *Elliott v. Pray*, 10 Allen, 378.

² *Zoebisch v. Tarbell*, 10 Allen, 385.

cure position, to the knowledge of the defendants, but not to the knowledge of the plaintiff. The plaintiff is injured while properly passing over the same. The defendants are liable.¹

The occupant may also be liable, though the business was not transacted by the plaintiff in the usual way or place, provided he could not so do it conveniently, and was not prohibited from doing it as he did; the defendant or his servant seeing him at the time. The plaintiff is not deemed a bare licensee in such a case.²

Where the injury has been sustained, not by reason of any improper condition of the defendant's premises, but by a fall down an ordinary stairway, or the like, the defendant is not guilty of negligence in leaving a door open or in failing to give notice of the place where danger may happen.³

As to this class of cases, it is to be observed that, if there be no actual invitation to the injured person to go upon the premises in question, in order to recover damages for injury sustained, he must have gone upon the premises for business with the occupier.⁴ But this is not enough. A man has no right to intrude himself upon another, even for purposes of business. The business which will justify an entry upon the premises, and entitle the party to damage for injury sustained, must, in the absence of an express invitation, or an engagement for services, be the business of the *occupant*, or business which he is bound to attend to. The ground of liability is that an invitation is implied; and an invitation can be implied only when the entry is made

¹ *Smith v. London Docks Co.*, Law R. 3 C. P. 326.

² *Holmes v. Northeastern Ry. Co.*, Law R. 4 Ex. 254; s. c. Law R. 6 Ex. 123.

³ *Wilkinson v. Fairrie*, 1 Hurl. & C. 633.

⁴ *Collis v. Selden*, Law R. 3 C. P. 495; *Carleton v. Franconia Iron Co.*, *supra*; *Tebbutt v. Bristol & E. Ry. Co.*, Law R. 6 Q. B. 73, 75.

in connection with business of the occupant. A retail dealer is bound to use due diligence to keep his premises in fit condition for persons who go to him to buy, but not (probably) for peddlers who go to sell; unless indeed they are persons with whom he is accustomed to deal and whom he expects to come into his store. So likewise, under the same circumstances, he would (probably) be liable for injury to a creditor, or his servant, who went into his store to demand payment of a debt due, but not to a person who went there to procure a subscription.

It remains to consider the nature of the duty which a master owes to his servants with regard to the condition of his premises, his machinery, tackle, and the like. It is settled law that the master is liable for injury sustained by reason of his negligence; and this is doubtless to be understood as the failure to exercise such care of his premises or machinery as a prudent or careful master would exercise.

If the apparatus to be made use of by the servant be unsafe to the knowledge of the master, and not to the knowledge of the servant, and the servant be liable to sustain damage thereby, a prudent master would give notice of the fact or procure proper apparatus; and one who should fail to do either would be liable for any damage sustained thereby by the servant without the latter's fault. For example: The defendants employ the plaintiff to lay bricks for them, which must be carried up over a scaffold, erected by the defendants. The materials of the scaffold are in bad condition to the knowledge of the defendants; but they direct the use of them, as being good enough. By reason of the bad condition of the materials, the scaffold falls, and the plaintiff is injured. The defendants are liable.¹

The nature and extent of this duty of the master have,

¹ *Roberts v. Smith*, 2 Hurl. & N. 213; s. c. *Bigelow's L. C. Torts*, 684.

however, been the subject of some conflict and doubt. It has sometimes been supposed that the duty grows out of the contract of service ;¹ but the contrary has with better appearance of soundness been maintained.² In other cases, and very commonly, it is said that the servant undertakes the ordinary risks incident to the business, and that the master therefore is not liable for damage sustained by the servant by reason of accidents arising from such risks ; supposing the master not to have been personally guilty of negligence.³ This may be considered the usual way of stating the nature of the master's duty. It has, however, been strongly argued that this does not truly state his duty ; and that, apart from the *dicta* of some of the judges, there is no authority for drawing a distinction between the duty which a master owes to his servant, with regard to the care of premises or machinery, and that which he owes to other persons who have gone upon his premises by invitation or for business.⁴

In accordance with this latter view, it is said that it is the duty of all who occupy land to which others have the right to resort upon business with the occupier to take care that those resorting there are not exposed to hidden dangers. Such persons have the right to expect that the occupier will use reasonable care to guard them from dangers of the existence of which he is or ought to be aware, and of the existence of which they are ignorant ; provided he has no good reason to presume that they have equal knowledge upon the subject with himself. And the decided cases are considered to fully support the assertion that the position

¹ See *Albro v. Jaquith*, 4 Gray, 99 ; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572.

² *Riley v. Baxendale*, 3 Hurl. & N. 445, Martin, B.

³ *Priestley v. Fowler*, 3 Mees. & W. 1 ; *Farwell v. Boston & W. R. Co.*, 4 Met. 49.

⁴ Story, Agency, § 453 d, note, Green's ed.

of the master towards his servant, in respect of his real estate, his machinery, or apparatus, is the same as his position in those respects towards all other persons with whom he has business relations. A servant may be as well acquainted as his master is with the danger of premises or the defects of machinery. If he is, he cannot recover, unless assured by the master that every thing not directly before his own eyes is safe. But the same may be true of customers.¹

This view is intended merely to point out the (supposed) fact that, in case of *personal* negligence in the occupant of premises, it matters not whether the person who has sustained the injury be a customer or a servant, and if a servant, that the injury was directly sustained by reason of the negligence of a fellow-servant. In other words, the mere fact that the plaintiff is a servant is considered as imposing no less degree of personal care than if he were a customer.

Whatever be the true doctrine concerning the relative positions of customers and servants, it is as to servants a well-established rule of law that the master's duty requires him to take all reasonable precautions for the safety of his servants, and that when he knows or ought to know that his premises, his machinery, or his apparatus are unsafe, the servant being ignorant of the fact, and the master having no sufficient cause to presume his knowledge, he (the master) is liable for damage thereby sustained.²

In the absence of personal negligence on the part of the master, his duty is not bounded with reference to injuries

¹ Story, Agency, *supra*.

² *Ib.*; Patterson v. Wallace, 1 Macq. 748; Williams v. Clouch, 3 Hurl. & N. 258; Mellors v. Shaw, 1 Best & S. 437; Bartonshill Coal Co. v. Reid, 3 Macq. 266; Watling v. Oaster, Law R. 6 Ex. 73; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 586; Walsh v. Peet Valve Co., 110 Mass. 23; Snow v. Housatonic R. Co., 8 Allen, 441.

sustained by a servant through the negligence of a fellow-servant, either by the law of England or of America, by his duty to customers. It is fundamental law that a man is liable to customers for damage sustained by reason of the negligence of his servants in the course of their business; but, in the absence of personal negligence on the part of the master, he is not liable for injuries sustained by a servant by reason of the negligence of a fellow-servant.¹ For example: The switch-tender of the defendants, a railroad company, negligently leaves his switch open, whereby the plaintiff, an engineer of one of the defendant's locomotives, is caused, without fault of his own, to run his engine off the track, from which he suffers bodily injury. The defendants are not liable, the evidence showing that they are not guilty of personal negligence; the switchman being shown to have been theretofore a careful and trustworthy servant.²

This doctrine is commonly supported on the ground above mentioned with reference to cases of master and servant; to wit, that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services. And the negligence of fellow-servants is deemed one of these ordinary risks.³

¹ *Farwell v. Boston & W. R. Co.*, 4 Met. 49; s. c. *Bigelow's L. C. Torts*, 688; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Beaulieu v. Portland*, 48 Maine, 291; *Weger v. Penn. R. Co.*, 55 Penn. St. 460; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Bartonshill Coal Co. v. Reid*, 8 Macq. 266; *Bartonshill Coal Co. v. McGuire*, *Ib.* 300; *Morgan v. Vale of Neath Ry. Co.*, Law R. 1 Q. B. 149.

² *Farwell v. Boston & W. R. Co.*, *supra*. It is held that, in the absence of evidence tending to show notice of the fellow-servant's incompetency, the plaintiff cannot recover. *Davis v. Detroit & M. R. Co.*, 20 Mich. 105.

³ *Ib.*; *Gilman v. Eastern R. Co.*, 10 Allen, 233; *Priestley v. Fowler*, 3 Mees. & W. 1.

It is well settled, however, that if the master was guilty of personal negligence he will be liable, notwithstanding the fact that the injury would not have been sustained but for the negligence of the fellow-servant. And the master is deemed guilty of such personal negligence if he has employed the fellow-servant with notice that he is an unfit person for the business to which he has been assigned, or, if the servant has been retained after notice to the master of his unfitness,¹ or if the master has notice that the premises, or machinery, or apparatus are defective;² the injured servant having no notice of the facts in either case.³ For example: The defendants, a railroad company, are charged with employing one H. as their engine driver, to run a "pony engine" about their depot at D., knowing him to be reckless and incompetent for such business, or having subsequently to his employment become aware that he is reckless and incompetent, and retaining him after such knowledge; and the plaintiff, a fellow-servant with H., without the former's fault, is injured by his reckless and negligent management of the engine. If these allegations are proved, the defendants are guilty of a breach of duty to the plaintiff, and are liable for the injury sustained by him.⁴ Again: The defendants, a railroad company, employ and keep in their service a switchman, alleged by the plaintiff, a fellow-servant, to be an habitual drunkard, to the knowledge of the defendants, and the plaintiff, without

¹ *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Harper v. Indianapolis, &c., R. Co.*, 47 Mo. 567; *Chapman v. Erie R. Co.*, 55 N. Y. 529. See *Toledo, &c., R. Co. v. Conray*, 61 Ill. 162.

² *Le Clair v. St. Paul & P. R. Co.*, 20 Minn. 9; *Lawler v. Androsco R. Co.*, 62 Maine, 463.

³ *Davis v. Detroit & M. R. Co.*, *supra*.

⁴ *Davis v. Detroit & M. R. Co.*, *supra*. But the facts were deemed not to support the allegations. As to what constitutes notice of incompetency, see the same case; also, *Gilman v. Eastern R. Co.*, 10 Allen, 233.

fault of his own, is injured by the act of such switchman carelessly leaving his switch half open. If the allegation is true, the defendants are liable; and the allegation is true if the case were such that the defendants ought to have known of the character of the switchman, though they did not know it.¹

Within this exemption of the master from liability for the consequences to one servant of negligence by another servant, the generally received rule appears to be that the term "fellow-servant" includes all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades or departments of it;² though by some of the courts it is considered that the parties are not fellow-servants if the person through whose negligence the injury was sustained is superior in authority to the person injured.³

In accordance with the more general doctrine, and with some of the examples already given, an engineer and a switchman are fellow-servants;⁴ so, of brakemen on different trains of the same railroad;⁵ so of a workman in a factory and the foreman or superintendent;⁶ and so of a carpenter employed by a railroad to repair fences, and an engineer of the same company.⁷

¹ *Gilman v. Eastern R. Co.*, *supra*.

² Story, Agency, § 453 d, note (Green's ed.).

³ *Pittsburgh, &c., R. Co. v. Devinney*, 17 Ohio St. 197, 210.

⁴ *Farwell v. Boston & W. R. Co.*, 4 Met. 49.

⁵ *Hayes v. Western R. Co.*, 3 Cush. 270.

⁶ *Feltham v. England*, Law R. 2 Q. B. 33; *Albro v. Agawam Canal Co.*, 6 Cush. 75. See *Lawler v. Androsc. R. Co.*, 62 Maine, 463.

⁷ *Seaver v. Boston & M. R. Co.*, 14 Gray, 466. See *Gilman v. Eastern R. Co.*, 10 Allen, 233; *Gillshannon v. Stony Brook R. Co.*, 10 Cush. 228.

If the person through whose direct negligence the injury was sustained by the servant was not a fellow-servant, various considerations will enter into the question of the master's liability ; supposing the accident to have happened upon the latter's premises. But the master will not be liable to a servant in any case unless (1) he was personally guilty of negligence or misconduct resulting in the damage, or unless (2) the damage was sustained through the negligence of one acting as the *alter ego* of the master, — not as his servant but as his agent. If the negligence were wholly that of a contractor or other party independent of the master, the master will not be liable ; since in no proper sense can the act of such a person be deemed the master's act.¹ If the negligent party were an agent, the question of the master's liability to his servant will (probably) depend upon the consideration whether the defective premises, machinery, or apparatus through which the injury was sustained by the servant belonged to the master, and, further, whether he or his agent had notice of the defect.

§ 8. OF CONSTRUCTIVE NOTICE.

It is a well-settled rule of law that if facts are brought to the knowledge of a person which would put him, as a man of common sagacity, upon inquiry, he is bound to inquire ; and, if he fail to do so, he will be chargeable with notice of what he might have learned upon examination.² In cases, therefore, in which a defendant's liability, *ex delicto*, depends upon his knowledge of a particular fact, it is enough that facts have been brought to his attention of

¹ Compare *Hilliard v. Richardson*, 3 Gray, 349 ; s. c. *Bigelow's L. C. Torts*, 636.

² *Warren v. Swett*, 31 N. H. 332 ; *Cambridge Bank v. Delano*, 48 N. Y. 326 ; *Willis v. Vallette*, 4 Met. (Ky.) 186 ; *Kennedy v. Green*, 3 Mylne & K. 718.

such a nature as, if pursued, would have led to a knowledge of the matter in question. A failure to make inquiry under such circumstances will be evidence of negligence.

§ 9. OF CONTRIBUTORY NEGLIGENCE.

Generally speaking, it is a defence to an action of tort that the negligence of the plaintiff contributed to produce the damage of which he complains.¹ The reason of this lies in the consideration that a man is not liable for damage which he has not caused; or, conversely, the law makes men liable in tort for those wrongs alone which they have caused.² If the defendant did not, either personally or by another under his express or implied authority, cause the damage, he is not liable; and it is part of the plaintiff's case to prove that the defendant caused the damage of which he complains.³ Now, if there intervened between the act or omission of the defendant and the damage sustained an independent act or omission which contributed to effect the damage, it follows that the misfortune might not have happened but for that act or omission; and hence the plaintiff cannot prove that the defendant caused the harm.

In some cases, the situation may be such that the plaintiff cannot recover even when the defendant's fault was adequate to produce the injury without the plaintiff's negligence, as in certain cases of collision where the fault on each side is contemporaneous.⁴ But in no case can the plaintiff recover where the evidence falls *short* of showing

¹ *Murphy v. Deane*, 101 Mass. 455.

² *Ib.* p. 464.

³ *Murphy v. Deane*, *supra*. The liability of a master for the (in fact) unauthorized torts of his servant, or of a principal for the like torts of his agent (which is probably the same thing), is in truth an exception to legal principles, finding its origin in early institutions.

⁴ *Ib.*

that the defendant's act or omission caused or was adequate to cause the injury.

On the other hand, conditions must not be confounded with causes. The mere fact that a person or his property is in an improper position, when, if he had not been there, no damage would have been done to him, does not preclude him from recovering. Such circumstance is only a condition to the happening of the damage, not a cause of it. The misfortune may have been a very unnatural and extraordinary result of the situation, not to be foreseen in the light of ordinary events; and, when that is the case, the fact that the person or property was in the particular situation is not in contemplation of law a cause of the damage. A man may in the day-time fall asleep in the country highway, or leave his goods there, and recover for injury by another's driving carelessly over him or them; since, though the position occupied is a condition to the damage, it is not the natural result of the act.¹

The law therefore considers whether the conduct of the plaintiff had a natural tendency, such as exists between cause and effect, to place the party or his property in the direct way of the danger which resulted in the disaster. If it had not, it did not in contemplation of law contribute to the injury. For example: The defendant sails a vessel in such a careless manner as to cause a collision with another vessel on which the plaintiff is a passenger; the plaintiff at the time standing in an improper place for passengers, to wit, near the anchor, which is struck by the defendant's boat and caused to fall upon the plaintiff's leg, breaking it. The defendant is liable; the plaintiff's standing in the improper position not contributing, in the legal sense, to the injury, since it would not be the natural and usual result of a collision that one standing there would

¹ See the remarks of Parke, B., in *Davies v. Mann*, 10 Mees. & W. 546, 549.

be hurt.¹ Again: The defendant driving carelessly along the highway runs against and injures the plaintiff's horse, straying improperly therein, and fettered in his forefeet so as not to be able to move with freedom. This is a breach of duty to the plaintiff; the latter's act not contributing in the true sense to the damage.²

In accordance with the same principle, it is stated that a traveller may be riding with a horse or carriage which he had no right to take or use, or on a turnpike without payment of toll, or with a speed forbidden by law, or upon the wrong side of the road; or his team may be standing in the street of a town, without his attending by them and keeping them under his command as the law requires; and in none of these cases is his right of action for any injury he may sustain by the negligent conduct of another affected by these circumstances. He is none the less entitled to recover, unless it appear that his own negligence or fault contributed to the damage.³

And the same is equally true though the plaintiff, instead of being guilty of negligence merely, is a positive trespasser, as the examples elsewhere given of parties injured by savage dogs or spring-guns while trespassing by day upon the defendant's premises clearly show; ⁴ for it is not the natural or usual effect of trespassing in the day-time (not feloniously) that the party should be bitten by a savage dog not seen before the entry, or maimed by the discharge of a hidden gun. Wrongful acts or omissions cannot be set off against each other, so as to make the one excuse

¹ *Greenland v. Chaplin*, 5 Ex. 243. Or, as Pollock, C. B., suggested, the plaintiff could not have foreseen the consequences of standing where he did; that is, such consequences were unusual, non-natural, and not the common effect of such an act.

² *Davies v. Mann*, 10 Mees. & W. 546.

³ *Norris v. Litchfield*, 35 N. H. 271, Bell, J.

⁴ *Loomis v. Terry*, 17 Wend. 496; *Bird v. Holbrook*, 4 Bing. 628; *ante*, p. 289.

the other, unless they stand respectively in the situation of true causes to the damage.

In this connection, special attention should be given to cases of injury sustained on Sunday through the defendant's negligence by a plaintiff engaged in acts neither of necessity nor of charity; in other words, in acts rendered unlawful by statute. By many of the courts, it is held that the plaintiff is not thereby precluded from recovering for damage sustained, in the absence of explicit language to that effect in the statute; and this on the ground that the mere doing of the illegal act is not, or may not be, contributory in the proper sense to the damage sustained.¹ For example: The defendant, a town, bound to keep a certain bridge in repair, negligently allows it to get out of good order; and the plaintiff, without notice of the condition of the bridge, in attempting to drive cattle over it to market on the Sabbath, breaks through the bridge, several of his cattle being killed and others hurt thereby. The defendant is guilty of a breach of duty to the plaintiff, and liable to him for the damage sustained; the violation of the Sunday law not properly contributing to the result, since it is not the natural or usual result of travelling on Sunday that damage should follow.²

This is clearly correct in principle, in the absence of language of the statute plainly intended to prohibit all actions for damage sustained on the Sabbath, except such as is caused without any violation of law by the injured party; but the contrary rule prevails in some States.³ This contrary rule, however, is considerably narrowed by

¹ *Sutton v. Wauwatosa*, 21 Wis. 21; s. c. *Bigelow's L. C. Torts*, 711; *Mohney v. Cook*, 26 Penn. St. 342; *Corey v. Bath*, 35 N. H. 530; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126.

² *Sutton v. Wauwatosa*, *supra*.

³ *Bosworth v. Swansea*, 10 Met. 363; *Jones v. Andover*, 10 Allen, 18; *Connolly v. Boston*, 117 Mass. 64.

the courts which adhere to it. It is considered not to apply to cases in which the defendant has misused property of the plaintiff hired on Sunday.¹ So, too, it is held by the same court that one who is walking on the highway on Sunday, simply for exercise and fresh air, may recover against a town for negligence whereby he has sustained damage.²

It is sometimes said that, if the plaintiff could have avoided the disaster by the exercise of reasonable care, he is not entitled to complain of the negligence of the defendant.³ But this is to be understood as having reference to the state of facts at the time of and just preceding the happening of the injury, and not to the previous fact of the plaintiff's putting himself or property where the misfortune occurred; unless, indeed, it were the natural effect of such first act that the misfortune should follow. In the moment of actual peril, the plaintiff must not be guilty of failing to exercise such reasonable care under the circumstances as he can, to protect himself against damage.

One who, however, becomes paralyzed by fear through the misconduct of the defendant, and while in such a state of mind, and owing to it, rushes into danger and is hurt, is not thereby guilty of contributory negligence. The defendant's unlawful act has caused the fear and loss of presence of mind, and what happens afterwards is but the natural effect of the act. For example: The defendant is carelessly driving an express wagon along the sidewalk of

¹ *Hall v. Corcoran*, 107 Mass. 251, overruling *Gregg v. Wyman*, 4 Cush. 322, upon the authority of which *Wheldon v. Chappel*, 8 R. I. 230, was decided. See, also, *Woodman v. Hubbard*, 25 N. H. 67; *Morton v. Gloster*, 46 Maine, 520.

² *Hamilton v. Boston*, 14 Allen, 475. See, further, *Cox v. Cook*, *Ib.* 165; *Feital v. Middlesex R. Co.*, 109 Mass. 398.

³ *Butterfield v. Forrester*, 11 East, 60; *Bridge v. Grand Junc. Ry. Co.*, 3 Mees. & W. 244; *Davies v. Mann*, 10 Mees. & W. 546; *Tuff v. Warman*, 5 Com. B. n. s. 573.

the street of a city, at a rapid rate, which suddenly comes up behind the plaintiff, when she instinctively springs aside to escape danger, and in so doing strikes her head against the wall of a building, and is hurt. The defendant is liable.¹

On the other hand, it is sometimes said that the plaintiff may be entitled to recover, if the *defendant* might, by the exercise of care on his part, have avoided the consequences of the negligence of the plaintiff.² But this doctrine appears to be applicable only to cases in which the plaintiff's negligence precedes that of the defendant. Where the negligence of the two persons is contemporaneous, and the fault of each operates directly to cause the injury, the rule is declared to be that the plaintiff cannot recover if by due care on his part he might have avoided the consequences of the negligence of the defendant.³ If the doctrine referred to were applied to cases of contemporaneous negligence, either party to a collision caused by their united carelessness might be entitled to recover against the other; when, in truth, neither can recover.⁴

The true question in all cases appears to be whether there was negligence or fault on the part of the plaintiff contributing directly, as a proper (or proximate⁵) cause, to

¹ Coulter v. American Exp. Co., 56 N. Y. 585. Whether the fright or confusion was caused by the defendant, and possibly, too, whether it was reasonable under the circumstances is a question for the jury. Johnson v. West Chester & P. R. Co., 70 Penn. St. 357; Galena, &c., R. Co. v. Yarwood, 17 Ill. 509. What would be reasonable in a child might not be reasonable in a man. Filer v. New York Cent. R. Co., 49 N. Y. 47.

² Tuff v. Warman, 5 Com. B. N. s. 573.

³ Murphy v. Deane, 101 Mass. 455, Wells, J.

⁴ Ib.

⁵ Causes are usually spoken of in the law books as proximate and remote, — *causa proxima non remota spectatur*, — but the latter kind is no proper cause at all. The expressions are unfortunate and misleading, besides being unnecessary.

the occurrence from which the injury arose ; if there was, the plaintiff cannot recover.¹

In some of the States, however, the question of the liability of the defendant in cases of contributory negligence or fault by the plaintiff is determined by comparison ; the doctrine being termed the doctrine of comparative negligence. The principle is, that the plaintiff is considered entitled to recover if the defendant's negligence exceeded his own, and that the defendant is not liable if the plaintiff's negligence was equal to or exceeded his own. The rule is borrowed from the admiralty law.²

Thus far of the contributory acts or omissions of the plaintiff. But it may be that, between the wrongful act of the defendant and the damage sustained by the plaintiff, there intervened an act of a third person or agency which directly produced the damage. If this be the case, and the misfortune would not have certainly followed without it, the defendant similarly will not be liable. For example : The defendant sells gunpowder to the plaintiff, a boy eight years old, who takes it home and puts it into a cupboard, where it lies for more than a week, with the knowledge of the child's parents. The boy's mother now gives him some of the powder, which he fires off with her knowledge. This is done a second time, when the child is injured by the explosion. The defendant is not liable, his negligence in selling the powder to the boy not being the proper cause of the damage.³

Indeed, the defendant can never be liable when any thing out of the natural and usual course of events arises or transpires in such a way as to make the defendant's negligence, otherwise harmless, productive of injury. A whirlwind does not usually arise on a quiet day, and

¹ *Murphy v. Deane*, *supra*.

² *Chicago, &c., R. Co. v. Van Patten*, 64 Ill. 510; Ill. Cent. R. Co. *v. Baches*, 59 Ill. 379. See *O'Keefe v. Chicago, &c., R. Co.*, 32 Iowa, 467

³ *Carter v. Towne*, 103 Mass. 507.

hence, though a person should build a small fire in the street, contrary to law, on a mild day, he would not (probably) be liable for the consequences of a whirlwind suddenly springing up and scattering the fire, to the damage of another.¹

The case will be different if the party acted with knowledge respecting the intervening act and of its probable effects. In this case he will be liable. For example: The defendant shoots a pistol against a polished surface in a thoroughfare, at such an angle as to render it likely that the ball will glance and hit some one. It does glance and hits the plaintiff. The defendant has caused the injury and is liable.² Again: The defendant throws a lighted squib into a market-house on a fair day, which strikes the booth of A, who instinctively throws it out, when it strikes the booth of B. The latter casts it out in the same manner, and it now strikes the plaintiff in the face, injuring him. The defendant is liable.³ Again: The defendant, a manufacturer of drugs, negligently labels a jar of belladonna, put up by him, as dandelion, the former a poisonous, and the latter a harmless, drug. The jar passes from the defendant to a wholesale dealer, then to a retail dealer, and a portion of it then to the plaintiff, who buys and takes it as dandelion. The defendant is liable; the intermediate parties having simply carried out the presumed intention of the defendant.⁴

In cases like the latter, however, where the alleged breach of duty is directly involved in a breach of contract, the English courts, and, to some extent, the American,

¹ Compare *Insurance Co. v. Tweed*, 7 Wall. 44.

² This example is fairly borne out by *Scott v. Shepherd*, 3 Wils. 403.

³ *Scott v. Shepherd*, *supra*.

⁴ *Thomas v. Winchester*, 6 N. Y. 397; s. c. *Bigelow's L. C. Torts*, 602. The reason given by the court, however, was that the defendant, being engaged in a very dangerous business, acted at his own peril.

deny the liability of the defendant to any one except to the party with whom he made the contract,—a point elsewhere noticed.¹ The American cases are not altogether consistent, even in the same State; but it is apprehended that the true rule of law, though it is not, perhaps, fully supported by all the authorities, is that, if the defendant can be fairly presumed to have intended the acts of the intermediate agency, he will be liable, though his act was a breach of contract with another. The fact of the existence of a duty to the person with whom he contracted is not inconsistent with the existence of another duty respecting the same thing. The duty to forbear to do negligently a thing obviously harmful, if not properly done, preceded the formation of the contract; and it is difficult to see how that duty, owed to all persons, could, by a contract made with one or several, be abrogated as to others.

The American authorities, elsewhere referred to,² which declare that a telegraph company is liable to the receiver of a message for negligence in the transmission, though the contract of transmission was made with the sender alone, afford support to the above doctrine; and there are decisions on other subjects which give it countenance.³

¹ *Ante*, pp. 110, 111, 277.

² *Ante*, p. 277.

³ *United Soc. v. Underwood*, 9 Bush, 609; *Coughtry v. Globe Woollen Co.*, 56 N. Y. 124; *Hodges v. New England Screw Co.*, 1 R. I. 312. See *Bigelow's L. C. Torts*, 617–619. But see *Fairmount Ry. Co. v. Statler*, 54 Penn. St. 375, which, however, is inconsistent with *New York & W. Tel. Co. v. Dryburg*, 35 Penn. St. 298. As to the English doctrine, see *Winterbottom v. Wright*, 10 Mees. & W. 109; *Collis v. Selden*, Law R. 3 C. P. 495; *Alton v. Midland Ry. Co.*, 19 Com. B. N. s. 213. In accordance with the rule in England, the person who buys a wagon of a retail dealer cannot, it seems, maintain an action against the manufacturer for mere negligence in its construction, resulting in injury to the purchaser; though the manufacturer made the wagon for the market, knowing that it was to be sold by the retail dealer for use. Compare *Winter-*

If the duties existing between the parties be those of carrier and passenger, or bailor and bailee, for reward, the carrier or bailor will be liable for the damage produced by a breach of his contract, due to his own negligence, even though the negligence of a third person should contribute to the damage sustained; for the party agreed to exercise due care, and has not done so.¹ For example: The defendants, a railroad company, contract to carry the plaintiff to W., but on the way the train carrying the plaintiff is brought into collision with the train of another railroad company, at a crossing, through the negligence of the managers of both roads, and the plaintiff suffers injury thereby. The defendants have violated their engagement with the plaintiff, and are liable for the damage sustained by him;² the damage being the natural effect of the defendant's negligence.

If, however, the defendant was not at fault in any respect at the time of the injury, or if, though at fault at the time, that fault had no connection with the damage sustained by the plaintiff, the defendant cannot be liable: the wrong has been done by the third person. But the defendant will (probably) be liable for the natural consequences of his negligence, contributing to the damage, though the misfortune would not have occurred but for

bottom *v. Wright*, *supra*. See, however, *Collis v. Selden*, *supra*. It is conceived that in America (except perhaps in Pennsylvania) an action could be maintained in such a case. It would, doubtless, be otherwise, if the wagon was made to order for the use of a particular person, and then sold by him to the plaintiff; for in this case the manufacturer never intended a use of the wagon by the latter. It was not in the usual and natural course of things that a vehicle made for a particular person should be sold by him. It should be observed, however, that damage to third persons received in the course of and by the negligent performance of a contract is actionable by them by all the authorities.

¹ *Burrows v. March Gas Co.*, Law R. 7 Ex. 96; *Eaton v. Boston & L. R. Co.*, 11 Allen, 500.

² *Eaton v. Boston & L. R. Co.*, *supra*.

the act of the third person.¹ This will certainly be the case if the damage was the natural result of the defendant's negligence, as where the switchman of a railroad carelessly puts a train on the track of a rapidly approaching train belonging to another line, and a collision follows.² So, too, it is the natural result of sending a train of cars off the usual time, without making signals of the fact, that a collision should follow, in the case of a railroad running trains at short intervals; but it is not the usual result of carelessly running off time that an engine should be maliciously started by a stranger and collide with the train thus off time. In the former case, the carrier would be liable for injury sustained by a passenger by reason of the collision; in the latter case, the contrary would, in principle, be true.

In those cases of contract in which a party assumes the position of an insurer, as in the case of a common carrier of goods, the question of contributory negligence on the part of third persons, or of the action of certain things over which the defendant has no control, becomes immaterial. Being an insurer, the defendant is bound to perform his contract at all events, unless prevented by the plaintiff or the act of God.

The rule prevails in England and in several of the States of this country, that a passenger in a stage or railway coach, or other vehicle, becomes, by the act of obtaining passage, identified in law with the driver or manager of the vehicle. The effect of this doctrine is, that in an action by the passenger against a third person for negligence, whereby the former has suffered damage in the course of the ride or journey, negligence on the part of the driver or manager of the vehicle in which the plaintiff has taken passage, contributing to the misfortune, is the contributory negligence of the plaintiff. The plaintiff, therefore, is not entitled to recover, though he may him-

¹ *Eaton v. Boston & L. R. Co., supra.*

² *Ib.*

self have been free from fault.¹ For example: The defendant, owner of a stage-coach, by her driver's negligence, runs over and kills the plaintiff's intestate, while he is alighting from another stage-coach; which latter coach, by the negligence of the driver, has stopped at an improper place for alighting. The latter's negligence is properly contributory, but the deceased was not personally at fault. The defendant is deemed not liable.²

This doctrine has been much criticised and often denied by other courts; ³ and, so far as it is put on the ground of identification, it is apprehended, not without reason. It is difficult to understand how the plaintiff can become identified with the driver of the carriage, when the driver is wholly under the control of another. The driver cannot be the passenger's servant in any accurate sense in such a case; since the essential element of the relation of master and servant is wanting, to wit, authority over the supposed servant. And, for the same reason, the driver cannot be considered as the passenger's agent. The passenger could not contract directly with the driver in the first instance, or require him to go or to stay; nor could he compel him to stop by the way, or direct him to take a particular road, or how to drive, or how to pass a coach or an obstruction.⁴

¹ *Thorogood v. Bryan*, 8 Com. B. 115; *Armstrong v. Lancashire Ry. Co.*, Law R. 10 Ex. 47; *Cleveland, &c., R. Co. v. Terry*, 8 Ohio St. 570; *Puterbaugh v. Reason*, 9 Ohio St. 484; *Lockhardt v. Lichenthaler*, 46 Penn. St. 151; *Smith v. Smith*, 2 Pick. 621.

² *Thorogood v. Bryan*, *supra*.

³ *Chapman v. New York & N. H. R. Co.*, 19 N. Y. 341; *Coleman v. New York & N. H. R. Co.*, 20 N. Y. 492; *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Danville, &c., Turnp. Co. v. Stewart*, 2 Met. (Ky.) 119; *The Milan*, 1 Lush. 388; *Brown v. McGregor*, Hay (Scotl.), 10; 1 *Smith's L. C.* 220 (4th Eng. ed.).

⁴ Identification, in any such sense as making the driver or manager of the vehicle the servant or agent of the passenger, is repudiated by *Pollock, B.*, in *Armstrong v. Lancashire & Y. R. Co.*, Law R. 10 Ex. 47, 52.

If, however, the passenger were himself at fault, as by participating in the negligent conduct of the driver, or by directing it in advance, it is clear that he could not recover; supposing the negligence to have contributed to the misfortune. In such a case as this, he makes the driver, *pro hac vice*, his servant, and may therefore be said to be "identified" with him.

The criticism above suggested, however, bears merely upon the *ground* of liability taken by the courts, and not upon the rule which denies the liability in such cases. It is unnecessary to take the position that the passenger is identified with the carrier in order to show that the defendant is not liable. The defendant is not liable because, the act of another having contributed to the misfortune, he cannot in ordinary cases be shown to have caused the damage. This would be equally true, as has already been seen,¹ had the contributory act or omission been the act or omission of a stranger to the passage.

If, however, the injury must have happened in the natural and usual course of events as the result of the defendant's negligence, without the negligence of the plaintiff's carrier, the defendant must in principle be liable. In the example above given, it was not the natural and usual result of the defendant's negligence that misfortune should befall the plaintiff: the injury could not have happened without the contributory negligence of another. Hence, the defendant was not liable.

The rule of law in some of the States is, however, inconsistent with this explanation; the broad position being taken that the passenger is entitled to recover, if himself free from contributory negligence, though his carrier was guilty of contributory negligence and could not maintain an action against the same defendant.² But it is appre-

¹ *Ante*, p. 312.

² *Chapman v. New York & N. H. R. Co.*, and other cases, *supra*.

hended that the courts were misled by the use of the term "identification" by the English judges. It is now conceded in England (as it was doubtless always meant) that the question really is, whether the defendant's act was the proximate cause of the loss.¹ It is impossible to understand how the defendant can be liable if this be not the case.

It should be observed that to deny the liability of the defendant in such cases is not to exempt from liability any of the participants in a joint tort, since there is no joint tort in the case. A joint tort is committed only when several persons participate by *consent* in the illegal act or omission, or when some of them act at the instance or command of others.²

In like manner, the negligence of the parent or guardian or person in charge of a young child, in allowing the child to fall into danger, is deemed by many of the courts imputable to the child, so as to affect the child with contributory negligence in all cases in which the parent or guardian would in the same situation be barred of a right of action.³ For example: The defendants, a railroad company, by the negligence of their servants in the course of their employment and the contributory negligence of a person in charge of the plaintiff, a child too young to take care of himself, injured the plaintiff. They are deemed not liable for the misfortune.⁴

This doctrine, however, is not accepted by all of the courts, and has often been met with the same answer that has been given to the doctrine of imputing to passengers the negligence of their carriers. The negligence of a

¹ *Armstrong v. Lancashire & Y. Ry. Co.*, *supra*.

² See the chapter on Conspiracy, *ante*, pp. 91, 93.

³ *Waite v. Northeastern Ry. Co.*, El. B. & E. 719; *Holly v. Boston Gas Co.*, 8 Gray, 123; *Callahan v. Bean*, 9 Allen, 401; *Pittsburgh, &c., R. Co. v. Vining*, 27 Ind. 513; *Lafayette, &c., R. Co. v. Huffman*, 28 Ind. 287.

⁴ *Waite v. Northeastern Ry. Co.*, *supra*.

parent or custodian of a child, it is said, cannot properly be imputed to the child; and, supposing the child incapable of negligence, the conclusion is reached that he can recover for injuries sustained by the negligence of another, though the negligence of the child's parent or guardian contributed to the misfortune.¹ For example: The defendants, a railroad company, run over the plaintiff, a child of tender years, while crossing the defendants' track; the plaintiff's parents negligently permitting the child to be upon the track. The plaintiff is deemed entitled to recover.²

It is clear that if the child himself be guilty of contributory negligence (supposing him capable of negligence), apart from the negligence of his parent or guardian, there can be no recovery; and whether the child be capable of personal negligence is a question of fact, depending upon his age and ability to take proper care of himself.³ It has sometimes been said that the same discretion is necessary in a child that is required of an adult.⁴ This, however, could only be true, it should seem, in those cases in which the child is sufficiently mature to be able to take perfect care of himself. As to other cases, the better rule is that, so far as the question of the *child's* negligence is concerned, it is only necessary that he should exercise such care as he reasonably can, or as children of the same capacity generally exercise.⁵

In the case of a child too young to take care of himself, it should also seem that, if the negligence of the parent or person in charge of him were in the proper sense contribu-

¹ Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 399; North Penn. R. Co. v. Mahoney, 57 Penn. St. 187; Louisville Canal Co. v. Murphy, 9 Bush, 522.

² Bellefontaine & I. R. Co. v. Snyder, *supra*.

³ Lynch v. Smith, *supra*; Lynch v. Nurdin, 1 Q. B. 29.

⁴ Burke v. Brooklyn R. Co., 49 Barb. 529.

⁵ Lynch v. Smith, *supra*.

tory, — that is, if the misfortune was the natural and usual result, as effect follows cause, of the negligence, — the defendant cannot be liable ; since the plaintiff cannot prove that the defendant caused the injury. If, however, the fault of the parent or guardian did not contribute to the misfortune, the defendant should be liable.¹ The parent or guardian could recover for an injury done to himself under such circumstances ; and *a fortiori* should a young child, incapable of negligence, be entitled to recover in such a case. And the same would be true of negligence on the part of the child (supposing him capable of negligence) when such fault did not contribute to the injury. For example : The defendant, a hackman, carelessly runs over a child five years of age, in a city, while the child is crossing a street alone, on his way home from school. The child is not guilty of any negligence further than may be implied from going alone ; and as to this the child's parent may be negligent. The defendant is liable ; the negligence of the child (if there was any in his going alone) and of the parent (if found to exist) not contributing to the misfortune, since it is not the natural and usual effect of a child's crossing the street that he should be run over.²

If the parent sue for himself, upon the relation of master and servant, for loss of service, the same principles must apply. If the child be incapable of negligence, the question will be whether the parent's negligence contributed in the legal sense to the misfortune ; and if the child were capable of negligence, and were in fact negligent, whether either his negligence or the parent's was contributory.³

¹ *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317, 323.

² *Lynch v. Smith*, *supra*. Of course, if the parent or child had had notice of the danger when the child attempted to cross, the negligence would have been contributory.

³ Compare *Ib.* ; *Glassey v. Hestonville Ry. Co.*, 57 Penn. St. 172.

According, then, to the better authorities, the parent's or guardian's negligence is "imputable"¹ to the child when that negligence properly contributed to the injury, because the defendant cannot be shown to have caused the misfortune. The same would be true of the negligence of an older brother² or sister of the child, or of a stranger, having the temporary charge of the child. When the negligence of the parent or guardian or other person did not contribute to the injury, it is not imputable to the child. The question in that case is, if the child himself were negligent.

Upon a survey of the whole subject of the present section, it will thus be seen that the weight of authority justifies the statement that there is nothing peculiar in the doctrine of contributory negligence.³ The simple question in any phase of the subject is, Was the act or omission of the defendant the proximate (that is, the true, efficient) cause of the misfortune? And this is the question in every case of disturbing agencies.

¹ The use of this term is scarcely less objectionable than that of "identification" in the case of carrier and passenger. It tends to conceal the true question at issue.

² See *Mulligan v. Curtis*, 100 Mass. 512.

³ The rule as to the burden of proof concerning contributory negligence is not uniform. In some States, it is necessary for the plaintiff to prove that he was exercising due care when the misfortune happened. In other States, it is held that the defendant must prove that the plaintiff was guilty of contributory negligence. *Bigelow's L. C. Torts*, 725, 726. The first named rule makes a peculiarity in the law relating to this subject.

II. SPECIAL DUTIES.

[This title is intended to include the second and third classes of duties mentioned in the Introduction; which duties, for the sake of brevity, are here termed Special Non-Contractual Duties and Contractual Duties. These are to be understood as logically distinct from the General Duties which have thus far been under consideration. In fact, however, they have, with two or three exceptions, been substantially disposed of already by the necessities of their connections; and it is now necessary to do no more than state the duties themselves.]

CHAPTER XVII.

SPECIAL NON-CONTRACTUAL DUTIES.

PUBLIC OFFICERS.

Statement of the duty. A, a public officer, owes to B the duty (1) to forbear, without due authority, to arrest or detain him or enter upon his premises; (2) to forbear in other things to exceed the bounds of or act without a valid authority, to the damage of B; (3) not to omit, to the damage of B, the execution of a lawful command made at the instance of B; (4) not to omit, to the damage of B, the exercise of such care or diligence or skill in the performance of his duties as a prudent man would exercise in the same situation.

INNKEEPERS.

Statement of the duty. A, an innkeeper, owes to B the duty to receive him as a guest into his inn, provided B present himself in a suitable condition or manner to be received, and A have sufficient room for him in his inn.

COMMON CARRIERS.

Statement of the duty. (1). A, a common carrier of passengers, owes to B the duty to receive him as a passenger in his vehicle, provided B present himself in a suitable condition or manner to be received, and A have sufficient room for him in his vehicle. (2). A, a common carrier of goods, owes to B the duty to receive B's goods for transportation, provided the goods be in a fit condition to be received and transported, and B have sufficient room for them in his vehicle, and profess to carry goods of the class to which B's goods belong.

WASTE.

Statement of the duty. A, tenant or mortgagor (in possession) of land, owes to B, reversioner or remainderman, or mortgagee, the duty to forbear to commit injury to the inheritance of the estate.

CHAPTER XVIII.

CONTRACTUAL DUTIES.¹

DECEIT IN SALES.

Statement of the duty. A owes to B the duty to forbear to mislead him to his prejudice, in the negotiations of a sale between the parties, by false and artful representations, apt to mislead.

INNKEEPER AND GUEST.

Statement of the duty. A, an innkeeper, owes to B, his guest, the duty to protect B's property, placed in the custody of A, against loss or damage not caused by B, unless, in the exercise of the greatest diligence, loss or damage is caused by the act of God or *vis major* or inevitable accident.

COMMON CARRIERS OF PASSENGERS.

Statement of the duty. A, a common carrier of passengers, owes to B, a passenger in his vehicle, the duty not to omit, to the damage of B, to exercise the highest degree of diligence, care, or skill practicable in the particular branch of business in which A is engaged.

COMMON CARRIERS OF GOODS.

Statement of the duty. A, a common carrier of goods, owes to B, whose goods he has undertaken to carry, the duty to transport those goods and deliver them safely, if

¹ The duties here specified are such as, when violated, may be redressed *ex delicto*; the breaches as stated constituting torts, when the injured party might in most cases sue *ex contractu*.

not prevented by B or the nature of the goods, at the place designated, unless, in the exercise of the utmost care or diligence to do so, he is prevented by the act of God or *vis major* or inevitable accident.

OTHER BAILEES.

Statement of the duty. A, a bailee who is not a common carrier, owes to B, for whom he has undertaken a trust, the duty not to omit, to the damage of B, to exercise such care, skill, or diligence in the execution of his trust as a prudent or skilful man of the same business would exercise in the same situation.

OTHER CONTRACTORS.

Statement of the duty. A, who has contracted with B for the performance of an act, owes to B the duty not to omit, to the damage of B, to exercise such care, skill, or diligence in the performance thereof as a prudent or skilful man of the same business would exercise in the same situation.

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STUDIES IN PLEADING



STUDIES IN PLEADING.

[The following Studies in Pleading are presented as suggestive of a useful mode of reviewing the subjects of the preceding chapters. Similar exercises for the chapters following Deceit can be easily framed by the instructor, or, better still, by the student under the direction of his preceptor.]

DECEIT.

1. From the judgment given on the demurrer to the following declaration, deduce the rule of law determined : —

Declaration. A. B., by E. F., his attorney, complains of C. D., who has been summoned to answer the said A. B., for that whereas the plaintiff, before and at the time of the grievances hereinafter complained of, was a wholesale dealer in dry goods in the city of — and State of —, one G. H. then, on the — day of — applied to the plaintiff and requested him to sell goods on credit to him, the said G. H. And the plaintiff, being then unacquainted with the character and pecuniary circumstances of the said G. H., was referred by him to the defendant for information respecting the same, whereof the defendant afterwards, and before the sale of any goods by the plaintiff to the said G. H., had notice, and the defendant, so having notice, was interrogated by the plaintiff respecting the character and pecuniary circumstances of the said G. H. Nevertheless, the defendant well knowing the premises, and that the said G. H. was then in bad and insolvent circumstances, and unfit to be trusted with goods on credit, but fraudulently intending to deceive and injure the plaintiff, then falsely, fraudulently, and deceitfully, in writing, signed

by himself the defendant, in answer to certain questions so put as aforesaid by the plaintiff, represented and affirmed that he the defendant then well knew the said G. H., and had had many business transactions with him, and that he the defendant had reason to believe, and did believe, the said G. H. to be a good man, and able and willing to pay for any goods which the plaintiff might sell him on credit. By means whereof the plaintiff, not knowing the contrary of the said representation, but believing the same to be true, on the day and year aforesaid, and on divers other days since that time, did sell and deliver to him the said G. H. goods on credit to the amount in value of \$10,000. Whereas in truth the said G. H., at the time the defendant so made the said representation to the plaintiff, was in bad and insolvent circumstances, and not fit to be trusted with goods sold to him on credit. And the plaintiff further says that the said sum of money which was to be paid for the said goods is wholly due and unpaid, and by means of the defendant's said false and fraudulent representation the plaintiff is likely wholly to lose the same. To the damage of the plaintiff in the sum of \$12,000, wherefore he brings his suit.

Demurrer. The defendant by J. K., his attorney, says that the plaintiff's declaration is not sufficient in law.

Demurrer overruled.

2. From the judgment on the demurrer to the following declaration, state the precise points decided, and deduce the rule of law determined:—

Declaration. A. B., by E. F., his attorney, complains of C. D., who has been summoned to answer the said A. B., and says that the plaintiff, heretofore, to wit, on the — day of —, at the request of the defendant, bargained with him to buy of him a certain horse for a certain sum of money, to wit \$500, and the defendant by then falsely warranting the said horse to be sound and gentle,

and quiet in harness, then sold the said horse to the plaintiff for the said sum of \$500, which was then paid by the plaintiff to the defendant: whereas in truth the said horse was, at the time of the said warranty and sale thereof, unsound, unsteady, not gentle, and ungovernable in harness, and hath from thence hitherto so continued. And the plaintiff further says, that the defendant, by means of the premises, deceived the plaintiff on the sale of the said horse as aforesaid. And thereby the said horse afterwards, to wit, on the day and year aforesaid, not only became of no use or value to the plaintiff, but also then kicked and broke the leg of, and ruined a certain other horse of the plaintiff, of great value, to wit, of the value of \$250; and thereby in the care, feeding, and disposal, of the said horse first mentioned, the plaintiff was put to great expense; to his damage in all the sum of \$1,000. Wherefore he brings his suit.

Demurrer. The defendant, by J. K., his attorney, says that the plaintiff's declaration is not sufficient in law. And the defendant shows to the court the following causes of demurrer to the said declaration, that is to say: (1) The plaintiff nowhere in his declaration alleges that the defendant knew that the said horse, sold to the plaintiff as alleged in his declaration, was unsound, unsteady, not gentle, or ungovernable in harness: (2) The plaintiff nowhere in his declaration alleges that he (the plaintiff) did not know that the said horse so sold to him was unsound, unsteady, not gentle, or ungovernable in harness, and that he believed the said horse to be sound, steady, gentle, and governable in harness: (3) The plaintiff nowhere in his declaration alleges that the defendant intended to deceive him in the sale of the said horse to the plaintiff: (4) And the plaintiff's declaration is in other respects informal, uncertain, and insufficient in law.

Demurrer overruled.

3. From the judgment on the demurrer to the following declaration, state the precise point decided, and supply the missing element:—

Declaration. A. B., by E. F., his attorney, complains of C. D., who has been summoned to answer the said A. B., for that whereas the defendant, heretofore, to wit, on the — day of —, was possessed and owner of a certain flock of sheep, in number, to wit, one hundred sheep, bargained with the plaintiff to sell to him the said flock for the sum of \$1,000; and the defendant having then falsely and fraudulently represented to the plaintiff that none of the aforesaid sheep were above the age of three years, then, on the day and year aforesaid, sold to the plaintiff the whole of the said flock of sheep as one entire lot for the said sum of \$1,000, which amount the plaintiff then and there paid for the same; whereas in truth a large number, to wit, fifty of the said flock of sheep, were much above the age of three years, and were, to wit, from six to nine years of age, as the defendant, at the time of making the said false and fraudulent representation, well knew. And the plaintiff further saith that by means of the premises the said flock of sheep, so sold as aforesaid to the plaintiff, were useless to him, and the plaintiff has been at great expense and trouble in the care and disposal of the said sheep; to his damage in all in the sum of \$1,000. Wherefore he brings his suit.

Demurrer. The defendant, by J. K., his attorney, says that the plaintiff's declaration is not sufficient in law.

Demurrer sustained.

4. From the judgment on the demurrer to the following declaration, state the precise point decided, and supply the missing element:—

Declaration. A. B., by E. F., his attorney, complains of C. D., who has been summoned to answer the said A. B., for that whereas the plaintiff, before and at the time of the

grievances hereinafter complained of, was possessed and owner of certain shares of stock in a corporation known as the Excelsior Mining Company, to wit, of one hundred shares, of great value, to wit, of the market value of \$125 per share, the defendant well knowing the premises and maliciously intending to injure the plaintiff in respect of his said stock, and to depreciate the same on the market, and to prevent the plaintiff from selling the said stock at the said market value, maliciously, falsely, and fraudulently on the — day of —, at —, represented and asserted in writing to divers persons, to wit, to J. R., S. W., and T. M., that the said Excelsior Mining Company was insolvent, and that a receiver had been appointed by the Court of Chancery to take charge of the said mine; whereas in truth the said mining company was not at that time, nor ever before or since had or has been, insolvent, and no receiver has ever been appointed to take charge thereof, but on the contrary the said mining company was at the time of the said false and fraudulent representations in the possession and management of the proper officers of the said corporation; all of which the defendant, before the grievances herein complained of, on the day and year aforesaid, well knew. And the plaintiff further says that the defendant by means of the premises falsely and fraudulently deceived the said J. R., S. W., and T. M., and many other persons as to the true financial state and control of the said mining company, insomuch that neither they, nor either of them, nor any one else, would give the plaintiff the said sum of \$125 per share for his stock, or for any part thereof, though requested so to do; and the said stock has by means of the premises become greatly reduced in value, and has never since the defendant's said false and fraudulent representations been worth more than \$50 per share on the market; and the plaintiff has sustained great trouble and expense in attempting to dispose of his stock in the said corporation.

To his damage in the sum of \$10,000. Wherefore he brings his suit.

Demurrer. The defendant, by J. K., his attorney, says that the plaintiff's declaration is insufficient in law.

Demurrer sustained.

5. From the judgment on the demurrer to the following declaration, state the precise point decided, and deduce therefrom a rule of law:—

Declaration. A. B., by E. F., his attorney, complains of C. D., who has been summoned to answer the said A. B., for that whereas the defendant, heretofore, to wit, on the — day of — was possessed as owner of a patent for the manufacture of treadles to sewing machines called the "American Treadle Patent," and being then desirous of selling and disposing of the said patent to the plaintiff, on the day and year aforesaid, contriving to deceive, defraud, and injure the plaintiff in this behalf, falsely and fraudulently represented and asserted to the plaintiff that the said patent was of the value, at the least, of \$5,000, and then offered the same to the plaintiff for the sum of \$4,000, and the plaintiff, not knowing the said representation to be false, but believing it to be true, was, by means of the said false and fraudulent representation and assertion, induced to accept the said offer, and to pay, and he did then pay to the defendant, for the said patent the sum of \$4,000; whereas in truth the said patent was utterly worthless, the pretended invention for which it was granted not being adapted in any degree to accomplish the purpose claimed for it by the defendant. And thereby the plaintiff was put to great trouble and expense in endeavoring to sell and dispose of the said patent. To his damage in the sum of \$5,000. Wherefore he brings his suit.

Demurrer. The defendant, by J. K., his attorney, says that the plaintiff's declaration is insufficient in law.

Demurrer sustained.

6. From the judgment given on the demurrer to the plea in the following case, state the precise point decided, and deduce a rule of law therefrom : —

Declaration. A. B., by E. F., his attorney, 'complains of M. R., C. W., J. T., and S. M., who have been summoned to answer the said A. B., for that whereas heretofore, to wit, on — day of —, the defendants, professed to be possessed and owners of a certain valuable railroad, called the "G. and H. Railroad," running between the cities of G. and H. in the State of —, prepared, published, and sent to the plaintiff a certain false and fraudulent document entitled "Prospectus of the G. and H. Railroad," in which the defendants falsely and fraudulently represented and asserted to the plaintiff that the said railroad was a corporation duly organized under and by virtue of the laws of the State of —, that its capital stock was the sum of \$5,000,000, and that upwards of one-fifth thereof had been actually paid into the treasury of said corporation; that the said railroad was in a highly prosperous condition; that for the past three years it had paid dividends equal to five per centum of its entire capital stock; and that its then present earnings were larger than ever before and rapidly increasing; and the said defendants then requested the plaintiff to subscribe and pay for one hundred shares of the stock of said railroad at the price of \$100 per share. And the plaintiff says that all of the aforesaid representations and assertions of the defendants, so made as aforesaid to the plaintiff, were wholly false, that no part of the said capital stock of the said railroad corporation had been paid, that no dividends had ever been paid by the said railroad, and that it was not in a prosperous condition, but on the contrary was insolvent, and the stock thereof worthless, all of which the defendants then well knew. But the plaintiff, not knowing the said representations and assertions to be false, but on the contrary relying thereon, and

believing the same to be true, then on the —— day of ——, by means of the premises purchased one hundred shares of the stock of the said corporation at the rate of \$110 per share, and then paid for the same. And the plaintiff further says that the defendants, by means of the premises, on the day and year last aforesaid, falsely and fraudulently deceived the plaintiff in the purchase of the said shares of stock, and thereby the same have become and are of no value to him, and the plaintiff has sustained great trouble and expense in endeavoring to dispose of the said shares of stock. To his damage in the sum of \$15,000. Wherefore he brings his suit.

Pleas. The defendants, by L. M., their attorney, say that they are not, nor is either of them, guilty of the said alleged grievances above laid to their charge, or any part thereof. And of this they put themselves upon the country.

And for a further plea the defendants say that the plaintiff did not buy the said one hundred shares of stock, or any part thereof, of the defendants, or of any one authorized to represent the defendants, but wholly of third persons, strangers, to wit, of certain bankers or brokers, in the market, acting solely in their own behalf. And this the defendants are ready to verify; wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action.

Replication to the first plea. And the plaintiff, as to the plea of the defendants first above pleaded, whereof they have put themselves upon the country, doth the like.

Demurrer to second plea. And the plaintiff says that the said second plea of the defendants is not sufficient in law.

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